Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

MORRIS A. WEINER, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Sallie W. Gladney
Counsel of Record
Teresa J. Womack
Thomas E. Redding
Redding & Associates, P.C.
2914 West T.C. Jester
Houston, TX 77018
(713) 965-9244
Counsel for Petitioners

QUESTIONS PRESENTED

1. The Fifth Circuit held that federal district courts do not have subject matter jurisdiction in a partner-level case to determine a partner's assessment period, *i.e.* each partner's individual assessment period can *only* be determined in a partnership-level case. But, for 1984, 26 U.S.C. §6226(d)(1)(B) expressly bars a partner whose assessment period has expired from participating in partnership-level cases. Does the Fifth Circuit's decision create a catch-22 between lack of subject matter jurisdiction in partner-level cases and lack of personal jurisdiction in partnership-level cases that denies partners *any* court of competent jurisdiction to assert their limitations defense in violation of the Due Process Clauses of the 5th and 14th Amendments, the Equal Protection Clause, the 1st and 6th Amendment, and the Privileges and Immunities Clause of Article IV?

2. In a partnership-level case may the Tax Court *sua sponte* expand both its subject matter and personal jurisdiction past the express limits imposed by Congress in 26 U.S.C. §6226(d) and (f)?

3. Under *Chevron v. NRDC, Inc.*, 467 U.S. 837 (1984), when a court reviews an agency's construction of a statute it administers, it must first give effect to the unambiguously expressed intent of Congress. Only if the statute is silent or ambiguous as to the specific issue may the court address whether an agency's regulation, or its interpretation of that regulation, is based on a permissible construction of the statute. The Fifth Circuit held Treas. Reg. §301.6231(a)(3)-1(b) "implicitly" extends the definition of "partnership item" past the express statutory restriction in 26 U.S.C. §6231(a)(3). Are the lower courts of the Fifth Circuit no longer required under *Chevron* to first determine that a statute is silent or ambiguous before deferring to an agency's interpretation of its own regulation?

PARTIES TO THE PROCEEDINGS BELOW

In addition to Morris A. Weiner, the named petitioner, M. Scott Kraemer and Joyce W. Kraemer were parties to the consolidated appeal before the Fifth Circuit and are petitioners here.

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OPINIONS BELOW

The initial memorandum opinion of the district court in *Weiner v. U.S.* was published at 213 F.Supp.2d 728, but was superceded by the amended memorandum opinion published at 255 F.Supp.2d 624 ("*Weiner I*"). App. 22-90. The denial of Weiner's motion for reconsideration was published at 255 F.Supp.2d 663 ("*Weiner II*"). App.91-108.

The opinion of the district court in *Kraemer v. U.S.* was not published but is available at 2002 WL 575791 (S.D.Tex.). App. 109-135.

The Fifth Circuit's opinion in the consolidated *Weiner/Kraemer* appeal was reported at 389 F.3d 152 ("*Weiner III*"). App. 1-20. The petitioners' motion for reconsideration *en banc* was denied on January 20, 2005. App. 21.

JURISDICTION

The Fifth Circuit entered its opinion on October 25, 2004, and entered an order denying the petitioners' motion for rehearing *en banc* on January 20, 2005. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant portions of the following statutory and regulatory provisions at issue are reprinted in the appendix to this petition: 26 U.S.C. §§6226, 6229, 6231, 6501, 7422, 7441, and 7442, Treasury Regulations §§301.6231(a)(3)-1(a) and (b), and H.R. Rep. No. 105-148 at 594, *reprinted in* 1997-4 C.B. at 916.

INTRODUCTION

Prior to 1982, if the IRS disagreed with the information on a partnership's return it audited the individual partners to adjust their partnership information. If taxes resulted for any partner then the IRS issued a statutory notice of deficiency and that partner could then raise any substantive partnership-level defenses and any partner-level defenses, such as his limitations defense to assessment, in either a pre-payment Tax Court suit or a post-payment refund suit in the district courts.

In 1982, Congress enacted TEFRA[1] which bifurcated the procedures for partnership tax audits. TEFRA established two distinct categories of "items": partnership items, which must first be determined in the partnership-level proceedings, and *non*partnership items, which are later determined in separate partner-level proceedings.

Under TEFRA, the partnership items are resolved first, then the IRS assesses any resulting tax deficiency. At issue is whether the partner can then raise his limitations defense to the assessment in a partner-level refund suit.

The standard three year assessment period may be extended either at the partnership level or by each partner. Therefore, partners may have different assessment deadlines even though the tax itself arises from their common partnership items.

For 1984 the Tax Court's subject matter jurisdiction in a partnership-level case is restricted to the adjustment of

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[1] Partnership procedures at 26 U.S.C. §§6221-6233, as enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324 ("TEFRA"), and as thereafter amended.

"partnership items" as defined by §6231(a)(3).[2] Not one element in computing a partner's individual assessment deadline – not even those common to all partners – meets §6231(a)(3)'s "subtitle A" requirement to be a partnership item. Nor can a partner's assessment deadline, or any element thereof, challenge in any way the partnership item adjustments before the Tax Court. But the Tax Court routinely assumes jurisdiction over the partners' assessment periods *sua sponte* in partnership-level cases without regard to the express limits enacted by Congress.

Here, the Fifth Circuit held that one element of a partner's limitations deadline is a partnership item that could be addressed only in the partnership-level Tax Court case; therefore, district courts do not have jurisdiction to address a partner's limitations defense in a refund suit.

At its core, this case addresses two threshold issues of first impression before this Court: first, this Court should finally resolve, after 23 years of TEFRA, the proper test to determine if an item is a partnership item. This basic issue affects virtually all TEFRA partnerships and huge numbers of taxpayers nationally. The current ambiguity and conflicting standards results in confusion and costly errors by both the partners and the government.

Second, and more specifically, under the proper standard is a partner's individual assessment deadline a "partnership item" as defined by §6231(a)(3)? If so, then they could only have been resolved in the partnership-level Tax Court case or the petitioners' settlements. If not, then the district court did have subject matter jurisdiction to determine them below. This is a fundamental issue pitting the plain language of §6231(a)(3) against the conflicting

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[2] Unless otherwise indicated all references to the "Internal Revenue Code," "I.R.C.," the "Code," "section," "Sec." or "§," shall be to the designated section of 26 U.S.C., as amended and effective for 1984.

standards applied by the various courts and is critical to resolving hundreds, if not thousands, of current disputes.

The Fifth Circuit and the courts it relied on disregard the plain language of §6231(a)(3), expand the Tax Court's jurisdiction past the express restrictions in §6226(f) and §6226(d)(1), and emasculate the standard of review established by this Court in *Chevron*; all in order to reach what they believe is a more sensible result. But within the complex procedural scheme of TEFRA the true result violates the due process rights of all partners for tax years before 1997 denying them *any* court of competent jurisdiction in which to assert their limitations defense.

There are no factual issues in dispute. Weiner and Kraemer do not ask this Court to determine their assessment deadline. They ask only that this Court review their cases to determine, once and for all, whether their individual assessment deadline is, by statute, a *non*partnership item that district courts have jurisdiction to determine in a partner-level refund case.

STATEMENT OF THE CASE

1. Factual Background

In 1984, petitioners Weiner and Kraemer were limited partners in separate but related partnership in a group generically referred to as "AMCOR". The IRS issued Notices of Final Partnership Administrative Adjustment ("FPAAs") proposing to adjust the partnership items of the partnerships. Partners other than the tax matters partners challenged the FPAAs by filing separate partnership-level cases in the Tax Court.

Weiner and Kraemer each settled their partnership items with the IRS thereby removing them from the Tax Court's jurisdiction. The partnership items of other, non-

settling partners remained before the Tax Court. App. 27.

The partners' agreements were limited to only their partnership items. The partners agreed that certain partnership items would be adjusted; all other partnership items were settled as "no change." They did not agree to waive any defenses to any resulting tax assessment, including their limitations defense. App. 40.

Weiner and Kraemer paid the resulting liabilities, filed administrative claims and separately sued for refunds in district court, asserting, among other grounds, that the IRS assessed after limitations expired.

The district courts split on the limitations issue. The *Weiner I* court held that a partner's assessment period is a *non*partnership item and, therefore, subject to its jurisdiction. App. 39. The *Kraemer* court dismissed for lack of jurisdiction *sua sponte* holding that a partner's assessment period, while not itself a partnership item, challenged partnership items and, therefore, could be addressed only in the Tax Court. App. 130.

On appeal, the Fifth Circuit joined other courts in acknowledging that a partner's assessment period cannot meet the statutory requirements of a "partnership item" but, without holding the statute silent or ambiguous, held the IRS's interpretation of its related *regulation* was "broad enough" to "implicitly" *make* the assessment period a partnership item and, therefore, subject exclusively to the Tax Court's partnership item jurisdiction. App. 9.

2. The History and Purpose of TEFRA

Partnerships do not pay income tax; they file information returns. §§701, 6031; Treas. Reg. §§1.701-1, 1.6031-1. Each partner's share of partnership income, gains, losses, deductions, etc., is reported and recognized on his individual return. §§701, 702; Treas. Reg. §1.702-1(a).

Before 1982, to adjust an item on a partnership return the IRS had to examine each partner's individual return and could not ensure consistent adjustments among partners. In response, Congress enacted TEFRA, which consolidated *some* of the partnership audit and adjustment procedures. *Maxwell v. C.I.R.*, 87 T.C. 783, 787 (1986).

Section 6221 of TEFRA mandates that "the tax treatment of any partnership item shall be determined at the partnership level" allowing a single centralized procedure to adjust statutorily defined "partnership items." §§6211(c), 6216(4), 6221, 6223, 6225(a), 6230(a)(1), and 6226; Temp. Treas. Reg. §301.6221-1T(a); *Callaway v. C.I.R.*, 231 F.3d 106,110 (2nd Cir. 2000). Congress left all nonpartnership items, including all partnership-level issues not defined as "partnership items," to be determine at the partner level. *Id.* at 108; *Maxwell* at 788.

Under TEFRA, if the IRS wants to adjust any partnership item it must issue an FPAA. §§6223(a)(2) and (d)(2). Judicial review at the partnership level is restricted to "partnership items." §§6226(a) and (f). App. 137.

A partner is a party to and may participate in the partnership-level case only as long as he has an ongoing interest in the outcome, *i.e.* only if his partnership items have not converted to nonpartnership items. §§6226(c), (d). App. 136.

A partner's items become nonpartnership items when he and the IRS enter into a partnership item settlement. §6231(b)(1)(C). Because settled partners no longer have an interest in partnership items, they may no longer participate in, nor be bound by, any partnership-level case. §§6226(d) and 6228(a)(4)(B); Tax Ct. Rules 245(b), 247(a).

Once the partnership-level case is concluded – either by conversion (*e.g.* settlement as to an individual partner) or by decision (as to all partners with unconverted partnership

items) – then the partner-specific determinations involving nonpartnership items are addressed in separate partner-level proceedings. *Maxwell* at 788; *Callaway* at 108.

When it enacted TEFRA Congress knew and referenced the long established subtitle A/subtitle F structure of the Tax Code and expressly restricted partnership items to subtitle A.[3] It further restricted them to *only* those subtitle A items "required to be taken into account for the partnership's taxable year." From those remaining, it then restricted "partnership items" even further to *only* those properly designated by regulation. §6231(a)(3). App. 139.

The definition of "partnership item" is not ambiguous. Congress spoke clearly and expressly enacted a narrow definition. Congress's plain language does not indicate it intended TEFRA to cure all the IRS's administrative partnership ills. It does indicate that Congress intended TEFRA to ease the IRS's administrative burden by allowing it to determine *most* subtitle A issues uniformly under TEFRA and to leave all others to be determined under the general, non-TEFRA partner/taxpayer-level procedures.

Congress's definition makes it clear that "partnership item" does not automatically include *every* "partnership-level issue," "issue concerning a partnership item" or "issues related to partnership items." By expressly limiting the definition Congress specifically exempted from TEFRA's unified proceedings all subtitle F procedural requirements and all subtitle A items not designated by regulation.

The Fifth Circuit, like others before it, misunderstood the true, *limited* scope of TEFRA. The plain language of the

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[3] Section §6231(a)(3)'s subtitle A restriction is not an anomaly. Congress expressly reiterated it in §§6229(a), 6229(c), 6229(e), 6229(f), 6231(a)(2) and 6234(e)(3). Section 6234(e)(3) was added in 1997 and does not apply to 1984; but Congress's express retention of the subtitle A restriction is clear.

statute makes clear that TEFRA was not intended to centralize the treatment of *everything* that *could* be resolved at the partnership level. TEFRA is not a panacea. It centralizes the adjustment of *some* issues – defined and restricted by statute as "partnership items" – instead of requiring the IRS to repeat the same procedure for each partner as to *those* common issues. §§6211(c), 6216(4), 6221, 6223, 6225(a), 6230(a)(1), and 6226; Temp. Treas. Reg. §301.6221-1T(a); *Callaway* at 110. Attempts to harmonize this mis-perceived goal with the strict language of only some discrete TEFRA provisions has unintended consequences. Here, the forced interpretation of isolated provisions, however noble its intent, is impermissible, wreaks havok when incorporated with other provisions of TEFRA, and perpetuates the cycle of confusion.

REASONS TO GRANT THE PETITION

This case addresses a recurring issue of exceptional importance to thousands of partners with partnership-level Tax Court cases currently pending for tax years prior to 1997.[4] Establishing the standard for determining what is and is not a partnership item will also affect all future

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[4] The Statistics and Reports Office of the Tax Court does not track the number or tax years of partnership-level cases pending before the Tax Court. Petitioner's counsel is unable to locate any third party source for this information. But it appears to be readily available to the IRS's Office of Chief Counsel through the Tax Litigation Counsel Automated Tracking System (TLCATS) which stores and can retrieve case data for all phases of tax litigation. Using TLCATS the Chief Counsel routinely provides the U.S. Tax Court with the status of cases on each trial calender and provides Chief Counsel management with case statistics. Should the government respond to this petition it could easily give a rough estimate of how many taxpayers are potentially effected by this issue by providing an estimate of how many partnership-level cases are currently pending before the Tax Court, and other courts, for tax years prior to 1997.

partnership cases on other issues in addition to the partners' limitations defense to assessment.

Partnership cases routinely have enormous financial consequences. For pre-1997 tax years the interest alone can be, if assessed now, as much as 700% of the tax deficiency.[5] In the AMCOR partnerships (the partnership group in which Weiner and Kraemer were partners) alone hundreds of similar refund claims have been filed, some of which could end up before every circuit court in the country. Uniform guidance on where and when a partner can validly raise his limitations defense to assessment is critical.

It is not uncommon for a TMP to either be disqualified or simply fail in his fiduciary duty to keep the partners apprised of the Tax Court proceedings.[6] The Fifth Circuit held that a partner's limitations defense can be raised only in the Tax Court case. But, as a practical matter, many partners never know there was a Tax Court case until the IRS assesses after that case is over. In general, those tax

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[5] While it may not be clear how many partnership returns are audited each year and how many of those end up before the Tax Court the IRS's website does give the number of partnership returns filed and the number of partners therein for some of the relevant tax years: 1990 (1,553,529 partnerships / 17,094,966 partners, 1995 (1,580,900 / 15,605,686), 1998 (1,855,348 / 15,663,372), 1999 (1,936,919 / 15,353,154), 2000 (2,057,500 / 13,639,967), 2001 (2,132,117 / 14,231,604), 2002 (2,242,169 / 14,328,169). The IRS projects that 2.5 million partnership returns will be filed in 2004 and reach 3.1 million by 2010. P ROJECTIONS OF RETURNS THAT WILL BE FILED IN CALENDAR YEARS 2004-2010. by Terry Manzi.

[6] In *Cinema '84 v. C.I.R.*, currently before the Second Circuit at Docket No. 04-4798-AG, the TMP was disqualified in 1994 but the Tax Court failed to appoint a replacement while the litigation continued for over ten years. The Tax Court acknowledged some partners were not receiving actual notice of the proceedings but failed to appoint a replacement TMP to give them constructive notice. Oral argument on this violation of the partners' due process rights is scheduled for May 16, 2005.

assessments, with interest compounded daily, are binding regardless of whether the partners were ever informed that there was a Tax Court proceeding in which they *could* participate or to which they would be bound.[7]

This Court's review is justified because the Fifth Circuit's holding contradicts Congress's plain statutory language, was only achieved by violating this Court's precedents, appears to impermissibly expand the Tax Court's subject matter and personal jurisdiction past Congress express restrictions, and violates the due process rights of all partners for tax years prior to 1997 by denying them any court of competent jurisdiction in which to raise their limitations defense to assessment.

If addressed, these issues will also resolve a split between the circuits on whether the subtitle A requirement of §6231(a)(3) alone is sufficient to determine if an item is or is not a partnership item.[8]

1. The Fifth Circuit's Holding Was Wrong As a Matter of Law

a. Determinations of Partnership Items and Nonpartnership Items are Mutually Exclusive

Congress expressly established mutually exclusive procedures for determining partnership items and nonpartnership items. §6221; *Callaway*, at 108. See

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[7] The failure of a TMP in his fiduciary duty to the partners does not offer the partners any relief from the tax assessment or the cumulative interest assessments which compound daily, often at the inflated, punitive rate under former §6621(c).

[8] Compare *Weiner III* to *Monti v. United States*, 223 F.3d 76, 82 (2nd Cir.2000) and *Prochorenko v. United States*, 243 F.3d 1359, 1363 (Fed.Cir.2001).

generally *Maxwell*, at 788. The legislative history confirms this mandatory bifurcation.[9]

District courts generally have subject matter jurisdiction over a taxpayer's claim for refund of tax and interest. 28 U.S.C. §1346(a) and 26 U.S.C. §7422(a). But §7422(h) denies district courts jurisdiction over any "refund attributable to partnership items."[10] Therefore, the subject matter jurisdiction of district courts in subsequent partner-level refund cases is restricted to *non*partnership items.

Here it is undisputed that the *tax deficiency* was "attributable to partnership items." But the partners are not *due refunds* because of any challenge to the amount of the tax deficiency. The partners are due refunds *only* because the IRS assessed that deficiency after limitations expired. Their *refunds* are "attributable to" the untimely assessments, *i.e.*, the statute of limitations on assessment.

At issue is whether each partner's individual assessment period, including its statute of limitations, is a partnership item.

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9 Neither the Secretary nor the taxpayer will be permitted to raise nonpartnership items in the course of a partnership proceeding nor may partnership items, *except to the extent they become nonpartnership items under the rules*, be raised in proceedings relating to nonpartnership items of a partner.

H. R. Conf. Rep. 97-760, at 611, emphasis added. See also 4 Arthur Willis et al., Partnership Taxation, §209.05 at 209-7, 209-12 (5th ed. 1996).

10 "Attributable to" and "attributable to a partnership item" are not defined in the Code. In th e Fifth Circuit, for tax purposes, "attributable to" requires a clear causal nexus *i.e.*, "due to," "caused by," or "generated by." *Todd v. C.I.R.*, 862 F.2d 540, 541-542 and fn. 5 (5th Cir. 1988); *Stanford v. C.I.R.*, 152 F.2d 450, 458-459 (5th Cir. 1998).

b. "Partnership Item" is Defined and Restricted By Statute

"Partnership item" is defined in §6231(a)(3) as

> (3) PARTNERSHIP ITEM.—The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year **under any provision of subtitle A** to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, [subtitle F] such item is more appropriately determined at the partnership level than at the partner level.

[Emphasis added.]

Anything that is not a "partnership item" is a "nonpartnership item." §6231(a)(4). App. 139.

Thus, by statute, there are three distinct requirements for an item to be a partnership item. It must:

(1) arise "under any provision of subtitle A;"

(2) be "required to be taken into account for the partnership's taxable year;" and

(3) be properly designated as a partnership item by regulation.

It is undisputed that a partnership's items of income, gains, losses, deductions, or credits arise under subtitle A and that the Secretary has, by regulation, defined them as partnership items as well as "the accounting practices and the legal and factual determinations that underlie the determination of the amount, timing, and characterization of the items of income, credit, gain, loss, deduction, etc." Treas. Reg. §§301.6231(a)(3)-1(a)(1)(i) and 301.6231(a)(3)-1(b). App. 142-144.

Subtitle A is titled "Income Taxes" and includes §§ 1-

1563. For purposes here it may be thought of as addressing "the numbers." Subtitle **F** is titled "Procedure and Administration" and includes §§**6001-7873**. Subtitle F includes the limitations period on assessments [§§6501-6533] and all of the TEFRA partnership procedural provisions [§§6221-6233], including the provisions to extend or toll the §6501(a) assessment period.

c. A Partner's Assessment Period is *Not* a Partnership Item

Section 6501(a) allows the IRS to assess any tax deficiency against a taxpayer for three years after his return is filed for that tax year. App. 140. The taxpayer may extend that period. §6501(c)(4)(A). App. 140. The §6501(a) deadline is in subtitle F and, therefore, its limitations period must be a *non*partnership item. Here it is undisputed that the normal §6501(a) assessment period for 1984 expired in 1988, long before the 1997 assessments.

Section 6229(a) extends §6501(a) for all partners, but only for taxes "attributable to partnership items," until three years after the *partnership's* return is filed regardless of any partner's individual §6501(a) deadline. App. 138.

An individual partner can also agree to extend the §6229(a) assessment period as to himself without regard to whether it is extended by other partners and the period of the extension can vary from partner to partner. §6229(b)(1)(A). App. 138. It is undisputed that a partner's extension of *his* §6229(a) assessment period is a *non*partnership item.

If an FPAA is issued while the §6229(a) period is still open as to one or more partners then §6229(d) tolls the §6229(a) assessment period until after the partnership item proceedings are concluded, but only as to those partners. App. 138.

Each partner's individual limitations deadline for the

IRS to assess any tax "attributable to partnership items" for a given tax year is

- 3 years from the date he filed his return [§6501(a), App. 140]; **plus**,
- any extension of §6501(a) he personally authorizes [§6501(c)(4)(A), App.140]; **plus**,
- an extension, if any, until 3 years after the partnership files its return [§6229(a), App.138]; **plus**,
- any extension of §6229(a) he personally authorizes [§6229(b)(1)(A), App. 138]; **plus**,
- any extension of §6229(a) the TMP authorizes [§6229(b)(1)(B), App. 138]; **plus**,
- if an FPAA is issued while his assessment period is still open for *any* reason (*e.g.*, he fails to file a his personal return), then until the §6229(d) tolling period expires. App. 138.

Every one of these components is a provision of subtitle F, not subtitle A. None is required to be taken into account for the partnership's taxable year. And not one has been prescribed by the Secretary in regulations as "more appropriately determined at the partnership level than at the partner level." Therefore, an individual partner's assessment deadline is, by definition, a *non*partnership item. This supports TEFRA's statutory scheme because each partner's assessment period may be different even though the tax is attributable to common partnership items.

In *Weiner III* the Fifth Circuit below acknowledged that the three requirements for a partnership item under §6231(a)(3) are mandatory; and that §6229(a), like §6501(a), "is located in subtitle F of the IRC ... [and] [n]o Treasury regulation specifically identifies the timeliness of an FPAA as a matter 'more appropriately determined at the

partnership level than at the partner level.'" App. 7-9.

Nonetheless, the Fifth Circuit held that the express restrictions in the *statute* (§6231(a)(3)) are irrelevant because the IRS's interpretation of a related *regulation* (§301.6231(a)(3)-1(b)) was "broad enough" to "implicitly" *make* the assessment period a partnership item. App. 9.

The Fifth Circuit, and the courts it cites in support, all base their holdings on an analysis articulated by the Court of Federal Claims in the unappealed *Slovacek v.U.S.*, 36 Fed.Cl. 250, 255 (1996).

Slovacek and its progeny, including the Fifth Circuit in *Weiner III*, ignore the plain language of §6231(a)(3) and instead torture the regulation in order to expand the definition of "partnership item" past the express restrictions in the statute.[11] They do this in order to rewrite the tax code to reach what *appears* to be a more sensible result. But this convoluted analysis is fundamentally flawed because it starts from a fundamentally flawed premise: that a partner's procedural challenge to the IRS's *assessment* is *per se* a substantive challenge to the *adjustment of his partnership items*.

To justify this flawed analysis the lower courts re-frame the issue from a partner's individual assessment deadline

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[11] Some surgically excise the subtitle A requirement from the quoted definition of "partnership item." *Chimblo v. C.I.R.*, 177 F.3d 119, 121 (2nd Cir. 1999); *Kaplan v. U.S.*, 133 F.3d 469, 473 (7th Cir. 1998); *Barnes v. U.S.*, 1997 WL 732594, *3 (M.D.Fla. July 28, 1997), *aff'd*, 158 F.3d 587 (11th Cir. 1998). Other do not even bother to define it. *Williams v. U.S.*, 165 F.3d 30 (6th Cir. 1998) (unpubl. decision).

The only courts to analyze the subtitle A issue with regard to §6229(a) are *WeinerI*, *Weiner II*, *Weiner III*, *Kraemer*, *Thomas v. U.S.*, 967 F.Supp. 505, 506 (N.D.Ga. 1997); and *Slovacek*. Each of these courts, except the district court in *Weiner I* and *Weiner II*, adopted the *Slovacek* analysis.

to the "§6229(a) ... FPAA statute of limitations provision." App. 5-6. But the courts err because (i) §6229(a) addresses the time limits for assessments and has nothing to do with issuing FPAAs, (ii) the partners' refunds are attributable to the IRS's untimely assessments, not to any re-adjustment of partnership items, and (iii) there is no statute of limitations for issuing an FPAA to adjust partnership items. Whether and when an FPAA is issued *may* be one element in determining any extension of a partner's individual assessment deadline but it is not *per se* the determining element and it does not automatically establish a common assessment deadline for all partners.

These fundamental misconceptions in a complex area of the tax law and the courts' attempts to "correct" TEFRA's statutory scheme has wreaked havoc on thousands of partners in the last two decades and will continue to do so if it is not corrected or at least finally settled by this court.

d. The Purpose and Function of an FPAA

An FPAA is issued for only one purpose: to adjust partnership items. If the FPAA is issued while a partner's assessment period is still open, then §6229(d) tolls his assessment period. App. 138. This is a possible affect of an FPAA but it is not the purpose for issuing an FPAA.

e. There is No Statute of Limitations for an FPAA to Adjust Partnership Items

There is no statute of limitations for issuing an FPAA. An FPAA issued after the assessment period for that tax year has expired for one or more partners is still valid for the purpose of adjusting *their* partnership items and is not moot. *Wayne Caldwell Escrow Partnership v. C.I.R.* , 72 T.C.M. (CCH) 554, 561 (1996).

The consequences of partnership item adjustments are not limited to the tax year in which they are made. Examples include adjustments to a loss suspended at the

partner-level for one or more partners under the "at-risk" or "basis" rules and claimed in years where assessment is still timely; or, increase in the basis of the partners' partnership interests causing losses when the partnership terminates. §301.6231(a)(5)-1T(b).

An FPAA issued 20 years after the partnership return is filed is valid to adjust the partnership items as long as it is the first FPAA issued for that tax year. But the IRS's ability to assess any resulting tax deficiency may be different for each partner.

The correctness of a partnership item adjustment and the IRS's right to assess any resulting tax deficiency are separate issues. The fact that the IRS fails to issue an FPAA in time to extend the §6229(a) assessment period for that tax year does not mean that the FPAA is a nullity or moot and does not bar the IRS from assessing any tax deficiencies for later tax years which arise as a consequence of the prior year's partnership item adjustments and where the later years are still open for one or more partners.

The basic problem for the courts below is confusion between a challenge to an *assessment* and a challenge to an *adjustment of partnership items*.

f. Weiner and Kraemer Have Never Challenged the Adjustments to Their Partnership Items

The partnership item adjustments here arise from the Taxpayers' *settlements*. For 1984, Weiner and Kraemer agreed to partnership item adjustments of $32,725.00 and $26,317.00, respectively. Those adjustments were agreed to by both the IRS and the petitioners and neither party may dispute them now.

The Fifth Circuit's analysis, following *Slovacek*, is illogically premised on the petitioner's refund claims challenging the agreed partnership item adjustments,

implying that Weiner and Kraemer assert their partnership item adjustments should be -0-. This is just flat wrong. Weiner and Kraemer agreed that their partnership item adjustments are $32,725.00 and $26,317.00, respectively. No party can or does dispute those adjustments. Weiner and Kraemer are due refunds because the IRS assessed after limitations expired, *not* because their partnership item adjustments should be -0-.

g. A Partner's Assessment Deadline *Cannot* Challenge the Adjustment of Partnership Items

Whether a final partnership item adjustment is based on a defaulted FPAA, a Tax Court decision, or a settlement, that *adjustment* is binding, but the assessment period must be open or the IRS cannot assess and collect any resulting *tax deficiency*, and a challenge to one is *not* a challenge to the other.

Using depreciation as an example: where an agreed change to a partnership's 1985 depreciation method (a partnership item) might result in a tax deficiency in 2003, a partner whose 1985 assessment period has expired cannot assert that the agreed 1985 partnership item adjustment and the resulting 2003 tax deficiency are invalid simply because the IRS cannot now assess against him for 1985.

The adjustment of partnership items and the IRS's ability to assess any resulting tax deficiency are separate issues with separate consequences and defenses.

h. The *Slovacek* Analysis Adopted by the Fifth Circuit is Patently Wrong

Slovacek acknowledged that §6229(a) "is part of subtitle F ... not subtitle A" and that it is not "expressly encompassed by the regulatory definition, since it does not appear on the list of partnership items at Treas. Reg. §301.6231(a)(3)-1(a)." *Slovacek* at 255. The *Slovacek* court,

without first examining if §6231(a)(3) is silent or ambiguous as required under *Chevron*, simply reframed the issue:

> The question is thus whether the partnership's statute of limitations [§6229(a)] is encompassed by Treas. Reg. §301.6231(a)(3)-1(b), which covers accounting practices, as well as the legal and factual determinations that underlie the determination of the amount, timing, and characterization of the partnership items set out in §301.6231(a)(3)-1(a).
>
> Determining whether [the TMP] extended the statute of limitations *might be said to affect the amount, timing, and characterization of income, etc., (partnership items) at the partnership level, if only in a thumbs-up or thumbs-down manner.*

But the district court in *Weiner I* correctly determined *Slovacek* was wrong and correctly pinpointed the error in its "aggressive reading" of Treas. Reg. §301.6231(a)(3)-1:

> Contrary to [*Slovacek*'s] analysis that the regulation encompassed the "thumbs up, thumbs down" issue of the timeliness of the FPAA, the limitations question is not of the same ilk as matters listed in §301.6231(a)(3)-1. ... Thus, §301.6231(a)(3)-1 was designed to cover more specific matters that affect the particulars of the tax due, and while the *Slovacek* court's analysis reaches a logical result, it is unsupported by the applicable regulations.
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> . . . .
>
> According to the plain meaning of the statutory language, an item does not become a "partnership item" simply because it affects the partnership as a whole and is more appropriately decided at the partnership level. This Court has jurisdiction over timely filed refund actions unless specifically restricted by statute. Congress has limited this

> Court's jurisdiction in partnership related refund actions only through IRC §7422(h), which precludes the exercise of jurisdiction over partnership items as that term is defined by §6231(a)(3). ...

Thus the district court in *Weiner I* correctly held that it had jurisdiction to address all elements of Weiner's limitations defense, including §6229(a), because it does not meet even one of the statutory requirements to be a partnership item. App. 38-39.

Weiner I correctly refrained from "attempt[ing] to compensate for poorly drafted IRC provisions and regulations" recognizing that "[c]ourts are particularly ill-equipped to overhaul complicated tax provisions whose function in the general tax scheme is often beyond their ken." quoting *Transco Exp. Co. v. C.I.R.* , 949 F.2d 837, 840-41 (5th Cir.1992). App.39. *Weiner I* correctly held Weiner's *refund* was attributable to, *i.e.*, caused by, the untimely assessment – a nonpartnership item. Therefore, §7422(h) did not bar its jurisdiction. App. 39.

But the *Weiner I* court was overturned by the Fifth Circuit which erroneously adopted the *Slovacek* analysis that "the treasury regulations have *implicitly* included the statute of limitations determination [§6229(a)] within the definition of 'partnership item.'" Emphasis added.

But the Fifth Circuit failed to explain how the *timing* of an FPAA could possibly effect *the adjustment of partnership items* when there is no statute of limitations for issuing an FPAA to adjust partnership items, even if the periods for assessing any or all resulting tax deficiencies has expired.

The Fifth Circuit then held that the "FPAA ... statute of limitations issue" is a partnership item and, therefore, each partner's individual limitations defense to assessment *must* be determined at the partnership level. App. 8.

But even *Slovacek* acknowledged that the other §6229

elements of a partner's limitations period for assessment are nonpartnership items specific to each partner. [12] Further, when a partner filed his personal return and whether he gave the IRS an individual extension as to §6501(a) are not partnership items by definition and cannot logically be deemed partnership items.

If allowed to stand, the *Slovacek* analysis means that for tax years prior to 1997 partners have no forum of competent jurisdiction to raise their entire limitations defense violating their fundamental right to due process.

2. The Fifth Circuit's Holding Violates the Partners'Fundamental Due Process Rights

The Fifth Circuit's decision that a partner can raise the §6229(a) element of his limitations defense to assessment *only* in the Tax Court, if upheld, is an improper taking or conversion of his limitations defense and violates the fundamental due process rights of all partners in all partnerships for tax years prior to 1997 because it denies them *any* forum of competent jurisdiction to assert their entire limitations defense to assessment.

In adopting *Slovacek*'s analysis the Fifth Circuit held that §6229(a), one element of a partner's limitations defense, is a partnership item and, therefore, can only be addressed in a partnership-level Tax Court case. Logically, if not legally, some elements could be addressed at the partnership level, *e.g.*, when the partnership return was filed and if the TMP granted a §6229(b)(1)(B) extension. But others cannot, *e.g.*, if and when a partner filed his return

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[12] *Slovacek* at 255 ("[A] statute of limitations issue applicable only to an individual partner involves questions of fact pertinent only to that partner, *e.g.*, whether he extended the statute of limitations for his own return, ..., or timely entered into a settlement agreement solely with respect to the partner's return, ..., or participated in preparing a fraudulent partnership return, ...").

[§6501(a), §6501(c)(3)], if he granted an extension as to his partnership items [§6229(b)(1)(A), §6229(b)(3), §6501(c)(4)] or if he filed a false or fraudulent return [§6501(c)(1)].

For 1984 the Tax Court's jurisdiction in a partnership-level case is restricted to partnership items and, therefore, the Tax Court cannot address or determine nonpartnership items such as §6501(a), §6501(c), and §6229(b). *Crop Associates-1986 v. C.I.R.*, 113 T.C. 198, 202-203 (1999).

The Fifth Circuit's holding mandates that for 1984 a partner's limitations defense to assessment can be litigated *only* in the partnership-level Tax Court case where he is barred from raising the partner-level elements that can be litigated *only* in partner-level district court refund cases. By adopting *Slovacek*'s analysis the Fifth Circuit, for tax years prior to 1997, has created a catch-22 that impermissibly denies partners *any* court of competent subject matter jurisdiction to address their complete limitations defense.[13]

Further, §6226(d), for 1984, unambiguously bars any partner from the partnership-level case if "the period within which any tax attributable to such partnership items may be assessed against the partner [has] expired." If his assessment period has expired §6226(d) denies the Tax Court *personal* jurisdiction over him. This means he *cannot* raise his limitations defense to assessment in the Tax Court even if, *arguendo*, *every* element is or, could rationally be, a "partnership item" under the Tax Court's *subject matter* jurisdiction. This second catch-22, between lack of subject matter jurisdiction in partner-level cases and lack of

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[13] It appears that the Fifth Circuit's holding will require a partner whose assessment period has expired to try to litigate in the Tax Court case to get some form of declaratory judgment on the §6226(a) element of his limitations defense to assessment and then litigate the remaining elements in a partner-level refund suit in the district court. But such a decision would be void as to him. See the discussion below.

personal jurisdiction in partnership-level cases again violates every partner's right to due process because it denies them *any* court of competent jurisdiction to assert their limitations defense to assessment.

The Fifth Circuit, and the cases it relies on, fail to address the consequences of either the forced splitting of a partner's limitations defense or the bar to personal jurisdiction in the Tax Court under §6229(d). App. 138.

An individual's right to pursue legal redress for claims with a reasonable basis in law and fact is fundamental and protected by numerous provisions of the Constitution[14] including: the Due Process Clauses of the 5 th[15] and 14th[16] Amendments, the Equal Protection Clause,[17] the 6th Amendment,[18] the Privileges and Immunities Clause of Article IV,[19] and the 1st Amendment protection of the right

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14 *Chambers v. Baltimore & Ohio RR Co.*, 207 U.S. 142, 148 (1907).

15 *Amer. Pelagic Fishing Co. v. U.S.*, 379 F.3d 1363, 1371 (Fed. Cir. 2004); *Johnson v. Atkins*, 999 F.2d 99, 100 (5 th Cir. .1993); *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976); *Song v. U.S.*, 43 Fed.Cl. 621,639 (1999), *citing Hurtado v. Calif.*, 110 U.S. 516, 527 (1884), *quoting Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244 (1819).

16 *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000); *Bounds v. Smith*, 430 U.S. 817 (1977); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

17 *Swekel v. River Rouge*, 119 F.3d 1259, 1262 (6thCir.1997); *Pa. v. Finley*, 481 U.S. 551, 557 (1987).

18 *Johnson v. Avery*, 393 U.S. 483 (1969); *Ex Parte Hull*, 312 U.S. 546 (1941).

19 *Bayou Fleet* at 857, *citing Chambers* at 148; *Ryland v. Shapiro*, 708 F.2d 967,971(5th Cir.1983).

to petition.[20] The Due Process Clause of the 14th Amendment guarantees access to both state and federal courts.[21] This right cannot be infringed upon or burdened. *Silver* at 163, *citing Adams v. Carlson*, 488 F.2d. 619, 630 (7th Cir. 1973).

A court of competent jurisdiction is required for legal redress. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982). A basic requirement of due process is that no valid judgment may be had or enforced without personal jurisdiction by that court. *Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389, 396 and fn. 9 (5th Cir. 2001). A judgment issued by a court lacking personal jurisdiction is void as to that person[22] and he is not required to appear in a federal court lacking personal jurisdiction to raise the jurisdictional defect. *Harper Macleod*, at 393. He is "always free to ignore ... [those] judicial proceedings, risk a default judgment, then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 706 (1982).

Section 6226(d) barred Weiner and Kraemer from raising their limitations defense in the Tax Court because it expressly denied that court personal jurisdiction over

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20 *Bayou Fleet* at 857 *citing Calif. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Bill Johnson's Restaurants*; *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Ryland*; *Eastern RR Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 138 (1961).

21 *DeWitt v. Pail*, 366 F.2d 682,685(9th Cir. 1966), *citing Stiltner v. Rhay*, 322 F.2d 314,316(9th Cir. 1963); *Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 680 (1930).

22 *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir.1996); *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir.1987).

them on that issue.[23] In violation of §6226(d) the Tax Court did allow other partners to raise their limitations defenses in the partnership-level cases. Had Weiner and Kraemer followed those erroneous examples any resulting decision would be void as to them because the Tax Court did not have *personal* jurisdiction over them on that issue even *if* every element of their assessment periods was a "partnership item" under its *subject matter* jurisdiction. They were, therefore, free to raise their limitations defense in their partner-level refund cases before the district courts.

3. The Tax Court May Not Expand Its Jurisdiction *Sua Sponte* Past the Express Limits Set by Congress

The Tax Court is an Article I court with *only* that jurisdiction expressly authorized by Congress and which may not be expanded by the parties or *sua sponte* by the court. §§7441, 7442; *Naftel v. C.I.R.*, 85 T.C. 527, 529 (1985), *citing Kluger v. C.I.R.* , 83 T.C. 309, 314 (1984). *Judge v. C.I.R.*, 88 T.C. 1175, 1180-1181 (1987); *Neely v. C.I.R.*, 115 T.C. 287, 290-291 (2000).

For the years at issue, §6226(f) expressly restricts the Tax Court's subject matter jurisdiction to the determination of "partnership items" as defined by §6231(a)(3) and their allocation among the partners. Similarly, §6226(c) expressly restricts the Tax Court's personal jurisdiction to those partners with an interest remaining in the outcome. And §6226(d) specifically bars personal jurisdiction over any

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[23] Weiner and Kraemer do not dispute that the Tax Court had personal jurisdiction over them; but *only* as to the adjustment of their partnership items and *only* until 1997 when they settled their partnership items with the IRS. The Tax Court did not issue its opinion on the limitations defense asserted by other AMCOR partners until 2000, long after Weiner and Kraemer ceased to be parties to the Tax Court case and even after they had filed their refund suits in the district court. *Agri-Cal Venture Assoc. v. C.I.R.*, 80 T.C.M.(CCH) 295, 296 (2000).

partner whose assessment period for that year has expired.

Despite the *Slovacek* analysis, the Tax Court recognizes that limitations is *not* a partnership item but asserts it is instead an affirmative defense to partnership item adjustments which the Tax Court can address because and §6226(f)'s "partnership item" restriction does not bar it from considering "affirmative defenses in connection with the determination of partnership items." *Crop Assoc. - 1986* at 202.

Under this same rational the Tax Court has wrongly addressed the partners' limitations defenses to assessment in pre-1997 cases. *Columbia Bldg. Ltd. v. C.I.R.*, 98 T.C. 607, 611 (1992); *Amesbury Apts, Ltd. v. C.I.R.*, 95 T.C. 227, 241 (1990); *Agri-Cal* at 296; *C-99 Ltd. v. C.I.R.*, 66 T.C.M. (CCH) 1485 (1993).

Even if, *arguendo*, the issue of whether an FPAA was issued in time to toll the §6229(a) assessment period under §6229(d) were a partnership item, the Tax Court, by its own analysis, would *still* not have jurisdiction to determine a partner's limitations period for pre-1997 tax years because at least one element of that defense is a *non*partnership item.[24] For example, equitable recoupment *is* an affirmative defense to partnership item adjustments. *Crop Assoc.* at 202. But the Tax Court has held that because "certain partner-level determinations are necessary elements to the defense of equitable recoupment" it cannot consider that defense in a partnership-level case because it would be "inconsistent with [the Tax Court's] limited jurisdiction under §6226(f)." *Crop Assoc.* at 203.

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[24] *Crop Assoc.* at 202 ("For a defense of equitable recoupment to succeed, however, the partners will have to establish certain partnership items. Each partner will also have to prove that he or she has made a time-barred overpayment of tax, and that is *not* a partnership item.").

The Fifth Circuit held that §6229(a) is a partnership item and, therefore, a partner's assessment period can only be determined in the Tax Court. However, under the *Crop Associates* analysis the Tax Court recognizes that even if it can determine the §6229(a) element it cannot determine the partner's assessment period because at least one of its other elements is a nonpartnership item and §6226(f) bars jurisdiction over that element.

But, as Weiner and Kraemer assert, by statutory definition, the §6229(a) extension period is *not* a partnership item, the Tax Court for pre-1997 tax years does *not* have subject matter jurisdiction to determine it or any other element of a partner's assessment period, and §7422(h) does *not* bar district courts from addressing their limitations defense to assessment in their refund suits.

It is well settled that as an Article I court the Tax Court has "no authority to apply equitable principles to assume jurisdiction over a matter not authorized by statute." *Calvert Anesthesia Assoc.-Pricha Phattiyakul, M.D. P.A. v. C.I.R.*, 110 T.C. 285, 287 (1998), and cases cited therein.

Therefore, in pre-1997 cases the Tax Court, *sua sponte*, impermissibly expanded its subject matter jurisdiction and its personal jurisdiction beyond Congress's express grant and without regard to Congress's express limitations in violation of its status under Article I.

This is a prime example of why this Court has held that courts are not "free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted .... If that effort is to be made, it should be made by Congress, and not by the federal courts." *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

4. The Decision Below Conflicts with This Court's Precedent in *Chevron*

If the unambiguous statutory definition of "partnership item" were not controlling then it could be argued that whether an FPAA was issued in time to toll the §6229(a) assessment period is an issue that logically *ought* to be addressed at the partnership level.[25]

Chevron established that courts may defer to agency regulations, or the agency's interpretation of its regulations, *only* when the statute is "silent or ambiguous with respect to the specific issue." *Chevron* at 842-43.

Neither the Tax Court nor any court adopting the *Slovacek* analysis has ever analyzed §6231(a)(3) and determined it to be silent or ambiguous. Like the Fifth Circuit below, each simply ignores *Chevron*'s "silent or ambiguous" requirement to hold that Treas. Reg. §301.6231(a)(3)-1(b) "implicitly" extends the definition of "partnership item" past the plain language of §6231(a)(3).

The Fifth Circuit's has established a new standard for regulatory interpretation for its lower courts which conflicts with this Court's standard in *Chevron*.

Under this new standard, courts are no longer required to first determine that a statute is silent or ambiguous on an issue before deferring to an agency's interpretation of its own regulation; instead, implicit under *Weiner III*, if one element of the statute authorizes an agency to issue regulations then the agency may, by regulation, supercede any other element in the statute it deems incompatible.

Congress restricted partnership items to subtitle A. It

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[25] In fact, Congress amended §6226(d) allowing personal jurisdiction in partnership-level cases for any partner to raise his limitations defense to assessment, but *only* for tax years after 1996. App. 136.

then restricted them to *only* those subtitle A items "required to be taken into account for the partnership's taxable year." From those, it further restricted them to *only* those properly designated by regulation. The statute is unambiguous; there are no gaps in its definition of "partnership item."

Section 6231(a)(3) allows the IRS to control the subtitle A items designated as "partnership items." But it may not defeat the unambiguous statute by designating outside of subtitle A, implicitly or otherwise. "When a statute includes an explicit definition, [courts] must follow that definition ...." *Meese v. Keene*, 481 U.S. 465, 484-485 (1987).

The fifth Circuit's holding should be reversed. "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *FCC v. RCA Comm.*, 346 U.S. 86, 90 (1953).

5. The Fifth Circuit's Holding Improperly Renders Two Statutory Provisions Superfluous, Void or Insignificant

If possible, a statute should not be construed so as to make another provision superfluous, void or insignificant. *Alaska Dept. of Env. Cons. v. E.P.A.* , 124 S.Ct. 983, 1002, n.15 (2004); see also *Dastar Corp. v. 20th Century Fox*, 539 U.S. 23, 34 (2003).

The Fifth Circuit bars a partner's limitations defense to assessment in district courts because it deems one element of that defense to be a "partnership item" subject to the Tax Court's exclusive jurisdiction. Therefore, it held, each partner must raise that element in the Tax Court or not at all. If this holding grants the Tax Court, for 1984, both personal and subject matter jurisdiction to make that determination as to partners whose assessment periods have already expired, then it improperly renders two statutory provisions "superfluous, void,or insignificant":

(i) pre-1997 §6226(d), barring any partner from the partnership-level Tax Court case if his assessment period has expired, and

(ii) every element of §6231(a)(3)'s definition of "partnership item."

Had Congress intended that a partner's individual assessment period, or any element thereof, be a nonpartnership item it would have avoided all of this by either including subtitle F in its definition of "partnership item" or simply leaving out the subtitle A restriction. "The statute, however, does not do so and no principle of statutory interpretation grants [federal courts] judicial license simply to rewrite statutory language by ascribing additional, material terms." *Texaco Inc. v. Duhe*, 274 F.3d 911, 920 (5th Cir. 2001).

CONCLUSION

Review by this Court and reversal of the decision below would (i) correct the unintended consequences of the lower courts' misplaced attempts to re-write the TEFRA provisions, (ii) restore to all partners for all tax years their rights to assert their limitations defense to assessment in a partner-level refund case before a district court, and (iii) establish a consistent standard for determining what is and is not a partnership item under TEFRA for all partners in all TEFRA partnerships, and, more specifically, resolve a significant portion of the hundreds of refund claims currently pending before the IRS for AMCOR partners and potentially headed for review before every Circuit Court of Appeals.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Sallie W. Gladney
Counsel of Record
Teresa J. Womack
Thomas E. Redding
Redding & Associates, P.C.
2914 West T.C. Jester
Houston, TX 77018
(713) 965-9244
Counsel for Petitioners

APRIL 2005

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United States Court of Appeals,

Fifth Circuit.

03-20174

MORRIS A. WEINER,

Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee-Cross-Appellant,

Consolidated with No. 03-20176

MARION S. KRAEMER; JOYCE W. KRAEMER,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Texas

Before JOLLY, DAVIS and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appealing in two related cases from separate courts, Morris Weiner, Marion Kraemer, and Joyce Kraemer seek refunds of federal income taxes and interest paid in connection with their investments in various partnerships. Three issues are raised. First is the question whether federal courts have jurisdiction, notwithstanding 26 U.S.C. §7422(h), to entertain the taxpayers' complaints that

Notices of Final Partnership Administrative Adjustments (FPAAs) were untimely filed and cannot be the basis of assessments against them. Second, the taxpayers challenge substantial interest charged against them for "tax-motivated transactions" pursuant to now-repealed §6621(c). We hold that the courts lacked jurisdiction over the statute of limitations issue and that §6621(c) interest was improperly charged. The third issue was resolved by a recent decision of this court at odds with the trial courts' decisions. *See Beall v. United States,* 336 F.3d 419 (5th Cir.2003) (district courts have jurisdiction to resolve taxpayers' deficiency interest abatement requests under §6404(e)).

I. The Factual Background

In the early 1980s, the taxpayers, all high-income professionals, invested in limited partnerships organized by American Agri-Corp ("AMCOR"). Weiner was a limited partner in Travertine Flame Associates ("TFA"); Joyce Kraemer was a limited partner in Oasis Date Associates ("ODA"); and Marion Kraemer was a limited partner in Coachella Fruit Growers ("Coachella"). The partnerships were farming entities that projected tax write-offs of approximately two hundred percent of the amount invested. The taxpayers reported their proportionate share of partnership losses on their 1984, 1985, and 1986 income tax returns.

In 1990 and 1991, the Internal Revenue Service ("IRS") sent each of the partnerships a Notice of FPAA that disallowed farming expenses and other deductions for a number of reasons, including that the partnerships' transactions were "shams" and lacked economic substance. Also in 1991, partners in TFA and ODA commenced a Tax Court action challenging the adjustments as time-barred. Because Weiner and Joyce Kraemer were partners in TFA

and ODA, they automatically became parties to the suit. *See* 26 U.S.C. §6226(c).

In early 1997, while the Tax Court cases were still pending, the taxpayers offered to settle their disputed partnership item deductions with the IRS through executions of Forms 870-P(AD). These settlement forms were initially sent to them by the IRS. The settlement agreement purported to disallow sixty-three percent of the deductions, as opposed to a total disallowance. The settlement documents made it clear that the IRS would assess additional tax liability and interest "as provided by law."

After accepting the taxpayers' settlements, the IRS assessed additional tax liability and interest pursuant to §6621(c) in the following manner: for Weiner in 1984 – in additional tax and $16,663.22 in interest; for the Kraemers in 1984 – $13,159 in additional tax and $16,599 in interest; for the Kraemers in 1986 – no additional tax (because they had overpaid) but $4,088 in interest. The taxpayers commenced their separate refund suits in 2000. They argued in motions for summary judgment: (1) that the statute of limitations prevented the 1984 assessments; (2) that additional interest under §6621(c) was improper as a matter of law; and (3) that the Commissioner had abused his discretion in denying their §6404(e) abatement of interest claim. The *Kraemer* court did not consider the limitations defense because it concluded it lacked subject matter jurisdiction over the issue. The *Weiner* court, however, concluded that it did have jurisdiction, and ultimately decided that the statute of limitations had not run. Both courts also determined that they lacked jurisdiction over the interest abatement claims. Both courts denied the taxpayers' summary judgment motions on the §6621(c) argument and set the issue for bench trials. The Kraemers conceded the issue before trial, but Weiner presented evidence on the merits and the court ultimately

concluded that the interest was improper and ruled in Weiner's favor. The instant appeals followed.

II. The Statutory Background

This case is governed by the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), 26 U.S.C. §§6221-6233, which was enacted to "improve the auditing and adjustments of income tax items attributable to partnerships." *Alexander v. United States,* 44 F.3d 328, 330 (5th Cir.1995). TEFRA requires partnerships to file informational returns reflecting the distributive shares of income, gains, deductions, and credits attributable to its partners. *Kaplan v. United States,* 133 F.3d 469, 471 (7th Cir.1998). Accordingly, the individual partners are responsible for reporting their pro rata share of tax on their income tax returns. *Id.; see also* 26 U.S.C. §701.

TEFRA requires the treatment of all partnership items to be determined at the partnership level. 26 U.S.C. §6221. While TEFRA defines a "partnership item" in technical terms, the provision generally encompasses items "more appropriately determined at the partnership level than at the partner level." *Id.* §6231(a)(3). All other items are defined as nonpartnership items. *Id.* §6231(a)(4).

If the IRS decides to adjust any "partnership items" reflected on the partnership's return, it must notify the individual partners of the adjustment through a Notice of FPAA. *Kaplan,* 133 F.3d at 471. The IRS is given three years from the later of (1) the date a partnership return is due, or (2) the date the partnership return is filed, to issue an FPAA. 26 U.S.C. §6229(a). The three-year period may be extended by agreement (1) between the Secretary and the partnership's tax matters partner ("TMP") (which binds all partners), or (2) between the Secretary and an individual partner (which binds only that partner). *Id.* §6229(b)(1). In addition, if the IRS mails an FPAA to the TMP, the three-

year period is tolled. *Id.* §6229(d). This three-year limitations period is at issue in this case.

For ninety days following issuance of an FPAA, the TMP has the exclusive right to file a petition for readjustment of the partnership items in Tax Court, the Court of Federal Claims, or a United States District Court. *Id.* §6226(a). After expiration of the ninety-day period, other partners are given sixty days to file a petition for readjustment. *Id.* §6226(b)(1). If a partner's tax liability might be affected by the outcome of the litigation of partnership items, that partner may participate in the proceeding. *Id.* §6224(a), §6224(c). The IRS may assess additional tax liability against individual partners within one year of the final conclusion of the partnership's tax determination. *Id.* §6229(d). The partner may contest the tax liability by paying the assessment and filing a refund action in a United States District Court. However, "[n]o action may be brought [in district court] for a refund attributable to partnership items." *Id.* §7422(h).

But, if a partner settles his partnership tax liability with the IRS, the partner will no longer be able to participate in the partnership level litigation, and will be bound instead by the terms of the settlement agreement. *Id.* §6228(a)(4), §6224(c)(1). In addition, partnership items convert to nonpartnership items when the IRS enters into a settlement agreement with the partner with respect to such items. *Id.* §6231(b)(1)(C). Thus, if a partner files an action for a refund attributable to partnership items, but those items have been converted through a settlement agreement, the jurisdictional bar of §7422(h) no longer applies. *Alexander v. United States,* 44 F.3d 328, 331 (5th Cir.1995).

III. FPAA Statute of Limitations

The *Weiner* and *Kraemer* courts reached opposing conclusions, and the parties disagree on whether district

courts have jurisdiction to decide the FPAA statute of limitations question in refund actions.[1] Generally, district courts have jurisdiction over a taxpayer's refund action. 28 U.S.C. §§1340, 1346(a)(1). However, as discussed above, with limited exceptions not applicable here, "[n]o action may be brought for a refund attributable to partnership items (as defined in §6231(a)(3))." 26 U.S.C. §7422(h). The more precise question in this case, then, is whether the taxpayers' refund requests are attributable to any partnership item such that the district court would be deprived of jurisdiction.

This court reviews a district court's grant of summary judgment de novo and considers the same criteria that the district court relied upon when deciding the motion. *Mongrue v. Monsanto Co.,* 249 F.3d 422, 428 (5th Cir.2001). Summary judgment is only appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, we review a district court's determination of subject matter jurisdiction de novo. *Calhoun County, Tex. v. United States,* 132 F.3d 1100, 1103 (5th Cir.1998).

The taxpayers' refund claims are based entirely on the theory that the IRS had no authority to assess tax against them in 1990 and 1991 because the FPAA statute of limitations had run for the years 1984 to 1986. Accordingly, to avoid the jurisdictional bar of §7422(h), the taxpayers argue that the FPAA statute of limitations, found in

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[1] The taxpayers also appeal the *Weiner* court's decision that, because the 1984 partnership returns were invalid, the statute of limitations did not begin to run. We need not reach this argument.

§6229(a), is not a "partnership item." [2] As noted before, TEFRA defines a "partnership item" as

> any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for the purposes of [subtitle F], such item is more appropriately determined at the partnership level than at the partner level.

26 U.S.C. §6231(a)(3). The taxpayers argue that because §6229(a), containing the FPAA statute of limitations provision, is found in subtitle F, as opposed to subtitle A, it

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[2] Although a partner's settlement agreement with the IRS converts partnership items to nonpartnership items and thereby lifts §7422(h)'s jurisdictional bar, the conversion did not occur in this case. The Code provides that only those partnership items encompassed by the settlement agreement are converted to nonpartnership items. *See* 26 U.S.C. §6231(b)(1)(C) (partnership items of a partner shall convert to nonpartnership items when "the Secretary or the Attorney General (or his delegate) enters into a settlement agreement with the partner *with respect to such items* ") (emphasis added). Section 6229(a) was not mentioned in the taxpayers' settlement agreements and thus may not be considered a converted item.

The holding in *Alexander* is not to the contrary. In that case, the taxpayer filed a refund action based on the IRS's admission, in a separate Tax Court proceeding, that the FPAA statute of limitations had run. 44 F.3d at 330. Because it was unnecessary for the court to determine the merits of the statute of limitations question when examining its jurisdiction to hear the refund suit, the court did not examine, as we must in this case, whether the FPAA statute of limitations was a partnership item that deprived the court of jurisdiction. Instead, the court examined the basis for its general grant of jurisdiction over the refund suit. In this regard, the court asked whether "the adjustments called for in the FPAA" were partnership items and determined that the settlement agreement, which settled those items specifically, converted them to nonpartnership items. *Alexander,* 44 F.3d at 331. Thus, the court found that it had jurisdiction to decide the *partner-specific* question of whether the taxpayer's settlement agreement *contractually* barred the refund (an issue not present in this case).

is not a partnership item. Furthermore, the taxpayers argue that no treasury regulation specifically refers to the limitations issue as a partnership item. *See* 26 C.F.R. §301.6231(a)(3)- 1(a). The *Weiner* court reasoned that this omission, coupled with the fact that §6229(a) is found only in subtitle F, prevents the FPAA statute of limitations from attaining partnership item status. We disagree with this conclusion.

First, the majority of courts to consider this issue have held that the FPAA statute of limitations issue is a partnership item that must be litigated in a partnership level proceeding. *See Chimblo v. Commissioner,* 177 F.3d 119, 125 (2nd Cir.1999); *Kaplan v. United States,* 133 F.3d 469, 473 (7th Cir.1998); *Williams v. United States,* 165 F.3d 30 (6th Cir.1998) (unpublished table decision); *Barnes v. United States,* No. 95-57-Civ-ORL-22, 1997 WL 732594, *3 (M.D.Fla. July 25, 1997), *aff'd,* 158 F.3d 587 (11th Cir.1998); *Thomas v. United States,* 967 F.Supp. 505, 506 (N.D.Ga.1997); *Slovacek v. United States,* 36 Fed. Cl. 250, 255 (1996). These courts have reasoned that because the FPAA limitations issue affects the partnership as a whole, it should not be litigated in an individual partner proceeding, as such a result would contravene the purposes of TEFRA. *See, e.g., Chimblo,* 177 F.3d at 125. We agree with this reasoning and hold that the district courts lack jurisdiction to consider the taxpayers' statute of limitations argument.

Second, responding to the taxpayers' argument directly, the treasury regulations provide that, for the purposes of subtitle F,

> [t]he term "partnership item" *includes* the accounting practices and the *legal and factual determinations* that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc.

26 C.F.R. §301.6231(a)(3)-1(b) (emphasis added). As the court in *Slovacek* reasoned, the statute of limitations "might be said to affect the amount, timing, and characterization of income, etc., (partnership items) at the partnership level, if only in a thumbs-up or thumbs-down manner." 36 Fed.Cl. at 255. In this way, the treasury regulations have implicitly included the statute of limitations determination within the definition of "partnership item."[3]

Third, we find distinguishable two cases the taxpayers rely on. In *Monti v. United States,* 223 F.3d 76, 82 (2nd Cir.2000), the court held that a partner's right to seek consistent settlement terms from the IRS was more appropriately considered a nonpartnership item. The Second Circuit relied on several factors to justify this conclusion, among them the fact that the right to consistent settlement terms, located in §6224(c)(2), is found in subtitle F, as opposed to subtitle A. *Id.* at 82. However, the first and arguably most important factor considered by the *Monti* court in deciding how to categorize a partner's right to consistent settlement terms dealt with the practical realities of that right. The court noted that

> [o]ne partner's right to settlement terms consistent with those granted to another partner is not a partnership item, *because* the question posed requires consideration of the relationship between one partner's situation and another's and the individual's, rather than the partnership's, communications with the IRS. The facts needed to

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[3] That the FPAA statute of limitations does not appear in subtitle A does not alone defeat this conclusion. The treasury regulations specifically provide that the term "partnership item" *includes* the legal and factual determinations underlying the amount, timing, and characterization of certain partnership items found in subtitle A. Therefore, this definition is broad enough to include in its parameters legal and factual determinations *not* specifically found in subtitle A.

> determine whether consistent terms were offered are *facts about the partner,* not facts about the partnership.

Id. at 82-83 (emphasis added). Conversely, the FPAA statute of limitations determination challenged in this case deals with facts specific to the partnership. The court need not consider the relationship between one partner and another or an individual's communications with the IRS.

Likewise, the court in *Prochorenko v. United States,* 243 F.3d 1359, 1363 (Fed.Cir.2001), relying on *Monti,* concluded that a partner's right to request consistent settlement terms was not a partnership item. That court opined that

> [w]hether or not the [taxpayers] were entitled to such a reduction is an issue that is entirely dependent on their own unique factual circumstances, and has no effect on and is not affected by the tax liability of any of the other [ ] partners. Accordingly, this is not the type of issue that is "more appropriately determined at the partnership level."

Id. at 1363 (quoting the treasury regulations). Again, the situation in this case is quite the opposite. The timeliness of an FPAA affects the IRS's ability to make adjustments to partnership items, which in turn affects all partners alike. This determination is more appropriately made at the partnership level.

From a practical perspective, a finding of jurisdiction over the statute of limitations issue would create an absurd result that contravenes TEFRA. As was the case here, partners could settle with the IRS and thus eliminate their ability to participate in and be bound by the result of any

partnership-level proceeding. But if, as here,[4] the Tax Court decided the substantive statute of limitations issue against the partnership, the settling partners could simply bring individual partner-level suits in the district courts and attempt to obtain a different ruling on the statute of limitations issue. Thus, some partners would be required to pay the assessed deficiency, while others would not. The result advocated by the taxpayers here is at odds with TEFRA's goal of consolidating decisions that affect the partnership as a whole.

Finally, the taxpayers contend that this court's decision in *Alexander* controls the determination whether the FPAA statute of limitations is a partnership or nonpartnership item. In *Alexander,* the taxpayer received an FPAA from the IRS notifying him of an adjustment to partnership items that would affect his tax liability. 44 F.3d at 329. The taxpayer and the IRS eventually entered into a settlement agreement binding the taxpayer to the IRS's treatment of the partnership items. *Id.* at 330. Over a year after making his deficiency payment, however, the taxpayer learned that another partner had challenged the IRS's FPAA adjustments in Tax Court on the basis of the statute of limitations. *Id.* In that proceeding, the IRS conceded that the statute of limitations had expired, and the court entered judgment for the partners. *Id.* Because Alexander had already settled with the IRS, however, the result in the Tax Court did not apply to him. *See* 26 U.S.C. §6231(b)(1)(c). As a result, he filed his own individual refund action in the district court. The Government defended the suit by arguing that the parties' contractual settlement agreement

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[4] The TMP for TFA and ODA stipulated during the Tax Court litigation that those partnerships' limitations arguments would be governed by the decision in what became known as *Agri-Cal Venture Associates,* 80 T.C.M. (CCH) 295 (2000). TFA and ODA thus became bound by the Tax Court's adverse statute of limitations decision.

prevented the taxpayer from bringing any suit for refund. 44 F.3d at 330.

A panel of this court addressed its jurisdiction to determine if the settlement agreement barred the refund suit. This court first noted that §7422(h) bars suits for refunds that are "attributable to partnership items." *Id.* at 331. The question then became whether the taxpayer's refund suit was in fact "attributable to" any partnership item. The court noted that while the refund was "at one time attributable to partnership items, that is, to the adjustments called for in the FPAA," the nature of those items was altered by the settlement. *Id.* Section 6231(b)(1)(C) provides that

> [f]or purposes of this subchapter, the partnership items of a partner ... shall become nonpartnership items as of the date ... the Secretary or the Attorney General (or his delegate) enters into a settlement agreement with the partner with respect to such items[.]

Therefore, the settlement agreement converted the partnership items to nonpartnership items for the purpose of the district court's jurisdiction.[5] The taxpayers argue here that this analysis comports with their jurisdictional argument and thus excepts their case from §7422(h)'s bar.

However, the *Alexander* court did not address the question whether the court had jurisdiction to consider the *substantive* statute of limitations issue. In *Alexander,* as opposed to this case, the Government *conceded* that the statute of limitations barred the assessments. Thus, once the *Alexander* court found that it had jurisdiction generally over the refund suit, the only substantive issue left to be

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[5] As discussed *supra* in note 1, conversion does not provide a basis for jurisdiction in this case.

decided was whether the settlement agreement contractually barred the suit. *Id.* at 331-32. The settlement agreement in *Alexander,* like the one in this case, required the taxpayers to agree that they would not bring any claim for refund based on the changed treatment of the partnership items. *Id.* at 330. The court held that the contractual provision did not bar the refund suit because the taxpayer "[did] not base his refund on the treatment of partnership items at all, but rather on the time-barred deficiency assessed as a result of such treatment." *Id.* at 332. The taxpayers here seize on this language as proof that the statute of limitations question is a nonpartnership issue. However, the *Alexander* court made this statement only in the context of analyzing the *contractual* settlement agreement. The *Alexander* court did not decide whether it had jurisdiction to reach the merits of the statute of limitations argument, because that argument had already been conceded. Thus, *Alexander* does not control the question presented in this case, and this court remains convinced that the district courts lack jurisdiction to decide the FPAA statute of limitations issue. On this issue, the decision of the district court in *Weiner* is therefore incorrect, while the *Kraemer* decision is correct.

IV. 6621(c) Increased Interest

Despite its repeal in 1989, the draconian interest provision enacted as §6221(c) continues to dog taxpayers for returns filed during the early 1980s. Consequently, these taxpayers contest the Government's imposition of additional interest pursuant to 26 U.S.C. §6621(c).[6] The provision

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[6] The Kraemers suffered an adverse judgment on this point, while Weiner prevailed on the court's finding that he had a profit motive relevant to the assessment of §6221(c) interest. We do not reach the issue the district court found dispositive. Defending against the Government's appeal, however, Weiner makes, inter alia, the same argument as the Kraemers.

imposes an interest rate of 120% of the statutory rate on "any substantial underpayment attributable to tax motivated transactions."[7] 26 U.S.C. §6621(c)(1) (1988). A "substantial underpayment" is any underpayment exceeding $1,000 per tax year. *Id.* §6621(c)(2). Included in the statutory definition of "tax motivated transaction" is "any sham or fraudulent transaction."*Id.* §6621(c)(3)(A)(v).

The taxpayers contend that the trial courts are precluded from upholding the §6621(c) interest assessment because their underlying settlement agreements do not establish that their underpayments were attributable to "tax motivated transactions." In the FPAAs, the Government asserted *several* bases for the disallowance of certain deductions. Among them was a "sham or fraudulent transaction," which qualifies as a "tax motivated transaction" for the purposes of 6621(c). 26 U.S.C. §6621(c)(3)(A)(v). Because the taxpayers settled with the IRS, however, there was never any need for a court to examine the IRS's claimed bases for disallowance and make a determination about their application.

The taxpayers principally rely on *Todd v. Commissioner,* 862 F.2d 540 (5th Cir.1988). *Todd* dealt with the IRS's imposition of the §6659(a) penalty. However, because both sections employ the same "attributable to" language, the analysis in *Todd* is instructive in the §6621(c) context. In *Todd,* this court held that the taxpayers' underpayment was not "attributable to" a valuation overstatement and thus §6659(a)'s penalty did not apply. The taxpayers in *Todd* did not settle with the IRS but instead chose to challenge the IRS's disallowances in the Tax Court. In that proceeding, the Tax Court held that the Todds were not entitled to their deductions and tax credits because the

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[7] This section was repealed in 1989, but it applies to the tax years in question in this appeal (1984 to 1986).

assets had not been put into service during the tax year. *Id.* at 541. On appeal, this court reasoned that because the deductions and credits were disallowed for a reason totally unrelated to any valuation overstatement, the resulting underpayment could not be "attributable to a valuation overstatement." *Id.* at 542.

The court then applied a treasury regulation formula that determines the portion of deductions to which the higher interest rate applies.[8] Because the court had already determined that no portion of the disallowed deductions and credits were "attributable to" the valuation

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[8] The formula for determining the amount of underpayment attributable to a valuation overstatement is as follows:

> (1) "actual tax liability" (*i.e.*, the tax liability that results from applying all of the IRS's proper adjustments) with
>
> (2) the "actual tax liability" reduced by the valuation overstatement adjustment.

The difference between (1) and (2) is the amount of the underpayment attributable to the valuation overstatement. *See Todd*, 862 F.2d at 542- 43.

Similarly, the amount of *tax motivated underpayment* for §6621(c) is determined in the following manner:

> (1) Calculate the amount of the tax liability for the taxable year as if all items of income, gain, loss, deduction, or credit, had been reported properly on the income tax return of the taxpayer ("total tax liability"); and
>
> (2) Without taking into account any adjustments to items of income, gain, loss, deduction, or credit that are attributable to tax motivated transactions ..., calculate the amount of the tax liability for the taxable year as if all other items of income, gain, loss, deduction, or credit had been reported properly on the income tax return of the taxpayer ("tax liability without regard to tax motivated transactions").

The difference between (1) and (2) is the amount of the tax motivated underpayment. *See* 26 C.F.R. §301.6221-2T, A-5.

overstatement, the two sides of the equation were equal. [9] The court noted that "where the deductions and credits ... were inappropriate altogether, the Todds' valuation of the property supposedly generating the tax benefits had no impact whatsoever on the amount of tax actually owed. *Id.* at 543. Or, stated another way, the Todds' underpayment was not "attributable to" a valuation overstatement.

In *McCrary v. Commissioner,* 92 T.C. 827, 1989 WL 35568 (1989), a case also heavily relied on by the taxpayers, the Tax Court adopted the reasoning in *Todd* and concluded that the McCrarys were not subject to §6659(a) or §6621(c) interest on the disallowed investment tax credit. The McCrarys conceded one of the IRS's grounds for disallowing the investment tax credit, thus eliminating the need for a trial on these issues in the Tax Court. *Id.* at 851. The ground conceded by the McCrarys (that their agreement was a license and not a lease) was neither a "valuation overstatement" nor a "tax motivated transaction." The Tax Court noted that alternative grounds could have justified the disallowance, including sham transaction, which would have qualified for the §6621(c) addition to tax. However, the Tax Court declined to address the sham transaction issue, which was unnecessary to support the conceded disallowance, for the sole purpose of applying §6621(c). *Id.* at 859.

The taxpayers also rely on *Heasley v. Commissioner,* 902 F.2d 380 (5th Cir.1990), in which this court relied on and extended the *Todd* rule. In *Heasley,* the IRS relied on a variety of reasons for disallowing the Heasleys' claimed tax

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[9] This is because the formula requires the court to determine the portion of underpayment attributable to a valuation overstatement "after taking into account any other *proper* adjustments to tax liability." *Todd,* 862 F.2d at 542 (emphasis added). Therefore, because the Tax Court determined that not placing the assets in service was a "proper adjustment," the two sides of the formula were equal.

credits. The Heasleys, like the taxpayers here, conceded the deficiency, but continued their suit in the Tax Court to challenge the §6659(a) and §6621(c) additions to tax. The Tax Court concluded that the Heasleys' underpayment was "attributable to" a valuation overstatement under §6659(a). The Fifth Circuit reversed. With regard to §6659(a), this court held that even though the Tax Court specifically found that the underpayment was "attributable to" a valuation overstatement, a situation that differed from that in *Todd,*

> [w]henever the IRS totally disallows a deduction or credit, the IRS may not penalize the taxpayer for a valuation overstatement included in that deduction or credit. In such a case, the underpayment is not attributable to a valuation overstatement. Instead, it is attributable to claiming an improper deduction or credit.

Heasley, 902 F.2d at 383.

These cases afford a conceptual lens through which to view the statutory phrase "attributable to" in the context of §6621(c). In *Todd,* the Government argued that "attributable to" really meant "capable of being attributed," such that any time a taxpayer's underpayment was capable of being attributed to a valuation overstatement, the penalty would apply. 862 F.2d at 542. However, the *Todd* court reasoned that the formula indicated that Congress did not intend for the penalty to apply *every* time valuation overstatement was at issue. Likewise, the §6621(c) formula, *supra,* determines the amount of tax motivated underpayment by *first* taking into account any other proper, but *non-tax-motivated,* deductions. On a theoretical level, the formula provides the same reinforcement for viewing

"attributable to" *narrowly* in the §6621(c) context.[10] When so viewed, it follows that when the FPAA lists several *independent* reasons for disallowing the taxpayers' deductions, there is no way to determine, without additional superfluous litigation, whether the taxpayers' underpayment is "attributable to" a reason that also qualifies as a tax-motivated transaction (such as a sham).

The Tax Court has twice embraced this narrow view of "attributable to" in §6621(c) cases and decided that a taxpayer's blanket concession precludes a finding that any underpayment is "attributable to" a tax motivated transaction. First, in *Rogers v. Commissioner,* 60 T.C.M. (CCH) 1386 (1990), the taxpayers conceded the IRS's ability to disallow deductions. The Tax Court relied on *McCrary, supra,* and reasoned that because "the determination of whether there was a tax-motivated transaction was made only concerning the disputes over the additions to tax and increased interest, we could not conclude that the taxpayer

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[10] The Second Circuit rejected this approach and instead adopted the "capable of being attributed" definition in the §6621(c) context. *See Irom v. Commissioner,* 866 F.2d 545, 547 (2nd Cir.1989). In distinguishing *Todd,* the Second Circuit announced a "separability" test: if two grounds for deficiency exist, one of which qualifies as a tax motivated transaction and the other of which does not, and the two grounds are "inseparable," then the formula relied upon in *Todd* does not apply. *Id.* at 547-48. This court in *Heasley,* again relying on *Todd* and the formula, noted *Irom* as contrary authority only. 902 F.2d at 383 n. 5. This represents this circuit's only acknowledgment of the *Irom* rule.

However, even if the *Irom* rule were to apply, the reasons listed by the IRS in the FPAA are "separable." For example, in addition to sham transaction, the FPAA listed as reasons for disallowing the deductions the following, inter alia: (1) the partnership did not actively engage in the trade or business of farming, and (2) the partnership expenses paid or incurred were not ordinary and necessary trade or business expenses deductible under §162. The Tax Court has found that both of these reasons are "separable" from a finding of sham or fraudulent transaction. *Harris v. Commissioner,* 58 T.C.M. (CCH) 1441 (1990).

required a trial that otherwise would have been unnecessary." *Id.* at 1397. The taxpayers also cite *Schachter v. Commissioner,* 67 T.C.M. (CCH) 3092, 1994 WL 263329, *5 (1994), in which the court noted that because the taxpayer entered into a stipulation of settled issues and conceded the disallowance of deductions, these actions "obviated the need for a trial on the numerous issues raised in the deficiency notice for the purpose of identifying which, if any of them, provided the substantive ground or grounds for disallowance...." The *Schachter* court was also persuaded that because of the numerous grounds alleged in the notice of deficiency, it was impossible to say that the underpayment was "attributable to" any one ground. The court noted:

> Here, as in [*McCrary*] and [*Rogers*], the melange of alleged grounds, some of which were "tax motivated" grounds – but others were not – prevent us from saying, after the concession, that the underpayment was attributable to a particular ground. We are not inclined, in these circumstances, to rely on petitioners' burden of proof to show that the transaction was not tax motivated, all or in part, for the purpose of section 6621(c). The objectives of administrative efficiency and judicial economy have been well served by the closing agreement and petitioner's concession. Those objectives would not be served by requiring a trial on the substantive issues for the sole purpose of determining whether petitioner is liable for 20 percent more interest on the deficiency under section 6621(c).

Id. at *6.

The same situation is present in these cases: the taxpayers settled or conceded the disallowances and paid the delinquent taxes, thus removing the need for a trial on the merits of those issues. This court can conceive of no

good reason to treat the taxpayers in this case differently from the taxpayers in *Todd, McCrary, Heasley, Rogers*, or *Schachter*. There is no way, given the multiple reasons provided for the disallowance in the FPAAs, to determine whether the underpayments are "attributable to" a tax motivated transaction. Additionally, §6621(c) was one of the provisions enacted by Congress "to deal with the Tax Court backlog." *Todd,* 862 F.2d at 544 n. 14. Yet, fifteen years after the statute's repeal, imposing the penalty in situations such as this does nothing to relieve the Tax Court's backlog, when the taxpayers have in fact settled with the IRS. Because, under the circumstances of these cases, the taxpayers' underpayments are not "attributable to" a tax motivated transaction as a matter of law, the IRS may not assess the additional interest against them. We thus endorse the result in *Weiner,* albeit on different grounds, but reverse that in *Kraemer*.

Conclusion

For the foregoing reasons, we conclude that the district courts lack jurisdiction to consider the taxpayers' FPAA statute of limitations arguments. Further, §6621(c) interest cannot be assessed against the taxpayers as a matter of law. Finally, pursuant to *Beall,* the district courts have jurisdiction to consider the taxpayers' §6404(e) interest abatement claims. Accordingly, the judgments of the trial courts are

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

United States Court of Appeals,
Fifth Circuit.
03-20174

MORRIS A. WEINER, Plaintiff-Appellant-Cross-Appellee,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee-Cross-Appellant,

Consolidated with No. 03-20176

MARION S. KRAEMER; JOYCE W. KRAEMER,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA, Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Texas

(Opinion 10/25/04, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, DAVIS, and JONES, Circuit Judges.

PER CURIAM:

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P. and 5th CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the court or a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/s/ Edith H. Jones
United States Circuit Judge

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Morris A. WEINER,	§	
	§	
Plaintiff,	§	
v.	§	No. CIV.A.00-1297.
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

AMENDED MEMORANDUM OPINION

ATLAS, District Judge

Plaintiff Morris Weiner seeks a refund of federal income taxes and interest for the tax years 1984, 1985, and 1986. This case is before the Court on the parties' motions for summary judgment as to Weiner's 1984 tax liability arising from his investment in the Travertine Flame Associates partnership,[1] as well as the parties' summary judgment motions as to Weiner's 1985 tax liability arising from his investments in two partnerships, Emperor Seedless-85 ("Emperor Seedless) and Indio Date Associates ("Indio

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[1] See Plaintiff's Motion for Partial Summary Judgment Based on Statute of Limitations for 1984 and Supporting Brief ("Weiner's 1984 Motion") [Doc. # 21] and United States' Cross-Motion and Supporting Brief for Partial Summary Judgment and Response in Opposition to Plaintiff's Motion for Partial Summary Judgment Based on Statute of Limitations for 1984 ("IRS's 1984 Cross-Motion") [Doc. # 27]. See also Plaintiff's Reply to the United States' Response in Opposition to Plaintiff's 1984 Motion ("Weiner's 1984 Reply") [Doc. # 39]; Plaintiff's Response in Opposition to the United States' 1984 Cross-Motion ("Weiner's 1984 Response") [Doc. # 44]; and Reply on United States' 1984 Cross-Motion ("IRS's Reply") [Doc. # 46].

Date").[2] Also before the Court are Weiner's and the IRS's summary judgment motions in regard to penalty interest assessed by the IRS under 26 U.S.C. §6621(c).[3] Finally, the IRS has moved for summary judgment on Weiner's claim for abatement of interest pursuant to 26 U.S.C. §6404.[4] These motions have been fully briefed and are ripe for determination. Having carefully considered the parties' briefs, oral argument, all matters of record, and applicable legal authorities, the Court concludes that Weiner's 1984 Motion and Weiner's 1985 Motion should be denied, the

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[2] See Plaintiff's Motion for Partial Summary Judgment Regarding 1985 Statute of Limitations Claim ("Weiner's 1985 Motion") [Doc. # 19] and United States' Cross-Motion and Supporting Brief for Partial Summary Judgment and Response in Opposition to Plaintiff's Motion for Partial Summary Judgment Regarding 1985 Statute of Limitations Claim ("IRS's 1985 Cross-Motion") [Doc. # 29]. See also Plaintiff's Response to United States' 1985 Cross-Motion [Doc. # 40]; Plaintiff's Reply to United State's Response in Opposition to Plaintiff's 1985 Motion [Doc. # 33]; Reply on United States' 1985 Cross-Motion [Doc. # 47]; Plaintiff's Supplemental Brief [Doc. # 56]; Plaintiff's Supplement to Supplemental Brief [Doc. # 58]; and United States' Supplemental Reply Brief on Dispositive Motions ("IRS's Supplemental Reply Brief") [Doc. # 54].

[3] See Plaintiff's Motion for Partial Summary Judgment with Respect to his §6621(c) Related Claims ("Weiner's §6621 Motion") [Doc. # 22]. See also The United States' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment with Respect to his §6621(c) Claims [Doc. # 26]; Plaintiff's Reply to United States' Opposition [Doc. # 32]; and United States' Response to Plaintiff's Motion for Protective Order and United States' Motion for Partial Summary Judgment Based on Settlement Agreement ("IRS's §6621 Motion") [Doc. # 48].

[4] See United States' Motion for Partial Dismissal of Plaintiff's Complaint ("IRS's §6404 Motion") [Doc. # 16]. See also Plaintiff's Response to United States' Motion for Partial Dismissal of Plaintiff's Claims [Doc. # 20]; and the United States' Reply to Plaintiff's Response to United States' Motion for Partial Dismissal of Plaintiff's Claims [Doc. # 24].

IRS's 1984 Cross-Motion should be granted, and the IRS's 1985 Cross-Motion should be denied. The Court further concludes that Weiner's §6621 Motion should be denied, the IRS's §6621 Motion should be denied, and the IRS's §6404 Motion should be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Travertine Flame Associates: Tax Year 1984

During tax year 1984, Weiner was a limited partner in a California limited partnership called Travertine Flame Associates ("TFA"). TFA was formed to acquire and develop land in southern California to grow grapes and for other farming activities. American Agri-Corp. (AMCOR) was Managing Agent of TFA. In 1984, the general partners of TFA were Fred H. Behrens, C.P.A., Chairman, President and director of AMCOR, George L. Schreiber, Vice Chairman, Senior Vice President, and director of AMCOR, and Robert A. Wright, Senior Vice President and director of AMCOR. Joseph O. Voyer, a CPA, was Treasurer and Controller of AMCOR. Neither AMCOR nor Voyer was identified as a general partner in the TFA Limited Partnership Agreement or the Private Placement Memorandum used to solicit limited partners for TFA.[5]

TFA timely filed a Partnership Return of Income for the 1984 tax year ("1984 return"). The 1984 return was signed on January 30, 1985 by "Joseph Voyer, Treasurer." Weiner timely filed his individual return for 1984 and paid his tax liability related to his partnership interest in TFA based on the 1984 return.

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[5] AMCOR, for a management fee, was responsible for managing all day-to-day activities of TFA, including negotiating and executing contracts and tax planning and reporting. AMCOR also was the managing agent for at least thirty-five other entities

In December 1985, AMCOR became a partner of TFA by purchasing a .5% general partnership interest. At about that time, TFA filed an Amendment to Certificate of Limited Partnership with the California Secretary of State listing AMCOR as one of its general partners.

The IRS began a criminal investigation of AMCOR and the general partners in 1988 or 1989. The IRS raided AMCOR's offices and confiscated partnership records in March 1989. The criminal investigation concluded without indictment in 1993.

On April 10, 1991, the IRS issued a Notice of Final Partnership Administrative Adjustment ("FPAA") for TFA for the tax year 1984. The FPAA set out the IRS's proposed adjustments to the expenses and deductions reported on the partnership returns.

B. Emperor Seedless and Indio Date: Tax Year 1985

During tax year 1985, Weiner invested as a partner in California limited partnerships known as Emperor Seedless and Indio Date, which purported to engage in a similar business as TFA. Behrens, Schreiber, and Wright were the general partners of Emperor Seedless and Indio Date. Emperor Seedless and Indio Date filed timely partnership returns for the 1985 tax year ("1985 returns"). Neither the Emperor Seedless nor the Indio Date 1985 return designated a Tax Matters Partner ("TMP"). The IRS contends, and Weiner denies, that in September, 1988, Emperor Seedless and Indio Date properly designated Schreiber as their TMP, and Schreiber then executed a valid extension of time for the IRS to issue an FPAA relating to the 1985 returns.

Weiner timely filed his personal income tax returns for 1985 and paid his share of taxes related to Emperor

Seedless and Indio Date in accordance with the partnerships' 1985 returns.

On April 10, 1991, the IRS issued FPAAs setting out the IRS's proposed adjustments to the expenses and deductions reported on the partnership returns for Emperor Seedless and Indio Date for the tax year 1985.

C. Tax Court Proceedings, Weiner's Settlements and Initiation of This Action

In July 1991, partners from TFA, Emperor Seedless, and Indio Date filed Petitions in Tax Court challenging the adjustments in the FPAAs ("Tax Court Cases"). Each Tax Court Case asserted that the statute of limitations barred the FPAA adjustments. In July 1999, the then TMP, Behrens, intervened in the Tax Court Cases. In December 1999, Behrens signed a Stipulation To Be Bound ("Stipulation") in each Tax Court Case agreeing that "the outcome of the statute of limitations issue present in this Partnership Case will be determined in a manner consistent with the Court's findings of fact and law on the statute of limitations issue present" in *Agri-Cal Venture Assoc. v. Commissioner*, 80 T.C.M. (CCH) 295 (2000) (the "*Agri-Cal* case"), which concerned several other similarly situated partnerships, including partnerships known as Agri-Venture Associates ("AVA"), and Agri-Venture Fund ("AVF"). See, *e.g.*, Exhibit 8 to United States' 1985 Cross-Motion, ¶ 6. On August 28, 2000, the Tax Court issued a detailed and comprehensive opinion in the *Agri-Cal* case, holding the IRS's FPAA for tax year 1984 was not time-barred because the partnership return filed by AVA was not a valid return and, accordingly, did not trigger the statute of limitations under §6229(a) of the Internal Revenue Code ("IRC"), 26 U.S.C. §6229(a). *Agri-Cal*, 80 T.C.M. (CCH) at 303. The Tax Court also held that the FPAAs for tax year 1985 were not time-barred because the

partnerships had extended the time for the IRS to issue FPAAs. Id.

Meanwhile, in late 1996, the IRS suggested a proposed settlement to resolve Weiner's portion of his tax liabilities by sending him a Form 870-P(AD) for each of the three partnerships in which Weiner had invested. In March 1997, while the Tax Court Cases were pending, Weiner executed and returned the Forms, thereby formally proposing the settlements to the IRS. The IRS signed each Form 870-P(AD), and accepted Weiner's settlement proposal for his tax liability related to TFA for the 1984 tax year and related to Emperor Seedless and Indio Date for the 1985 tax year.

The IRS contends that a Summary of the AMCOR Appeals Settlement Offer ("SAASO") was attached to each Form 870-P(AD) it sent to Weiner and that the SAASO makes it clear that the settlements included Weiner's agreement to the assessment of interest pursuant to IRC §6621. Weiner denies receiving the SAASO.

Weiner paid the tax and interest assessments in October 1997. In January 1998, Weiner filed a claim with the IRS seeking a refund of taxes. The IRS denied Weiner's claim based on the Form 870-P(AD) settlements.

Weiner filed the current action in this Court in April 2000, asserting in part that any assessment against him for 1984 and 1985 are barred by the statute of limitations. Weiner also seeks a refund of interest assessed pursuant to IRC §6621 on the grounds that his settlements with the IRS contain no statement that his underpayment of taxes was attributable to a tax motivated transaction. Weiner also seeks an abatement of interest pursuant to IRC §6404 on the grounds that any delay in his payment of a deficiency for the 1984 and 1985 tax years was attributable to an unreasonable delay by the IRS in making the assessments.

As noted above, the Tax Court decided the *Agri-Cal* case in August, 2000 in favor of the IRS. On July 19, 2001, in accordance with the Stipulation to be Bound, the Tax Court issued decisions rejecting the statute of limitations defenses of TFA, Emperor Seedless, and Indio Date.

II. STATUTORY FRAMEWORK UNDER "TEFRA"

Before addressing the specific issues raised by the parties' various motions, a brief explanation of the statutory framework governing the assessment of partnership taxes is in order.

Partnerships are not directly subject to income tax. Partners are liable to the tax in their individual capacities, on a pro rata basis corresponding to their ownership interest in the partnership. 26 U.S.C. §701; *Chimblo v. Commissioner*, 177 F.3d 119, 121 (2nd Cir.1999), *cert. denied*, 528 U.S. 1154, 120 S.Ct. 1159, 145 L.Ed.2d 1071 (2000); *Kaplan v. United States*, 133 F.3d 469, 471 (7th Cir.1998). Congress enacted the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), 26 U.S.C. §§6221–6233 (enacted by Pub.L. No. 97-248, §402, 96 Stat. 324 (1982)), to achieve consistent treatment of all partners in a partnership and to alleviate the administrative burden of determining partnership-related tax issues at the individual partner level. 26 U.S.C. §6221; *Alexander v. United States*, 44 F.3d 328, 330 (5th Cir.1995); *Chimblo*, 177 F.3d at 121; *Kaplan*, 133 F.3d at 471.

Partnerships are required to file informational returns reflecting the partners' distributive shares of income, gains, deductions, and credits. *Kaplan*, 133 F.3d at 471. The IRS must provide notification to individual partners of any adjustments it believes are necessary as to "partnership

items" reported in the partnership return.[6] This notification is through a Notice of Final Partnership Administrative Adjustment, or FPAA. *Id.*

Under TEFRA, the treatment of all partnership items must be determined at the partnership level. 26 U.S.C. §6221; *Chimblo*, 177 F.3d at 125; *Kaplan*, 133 F.3d at 473 ("TEFRA requires that all challenges to adjustments of partnership items be made in a single, unified agency proceeding; indeed, this is the key component of TEFRA that yields the desired benefits of economy and consistency."). A partnership item is "any item required to be taken into account for the partnership's tax year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level." 26 U.S.C. §6231(a)(3).[7] The Treasury Regulations more specifically define partnership items as "items of income, gain, loss, deduction or credit of the partnership." Treas. Reg. §301.6231(a)(3). Nonpartnership items are all other items. 26 U.S.C. §6231(a)(4).

TEFRA requires partnerships to designate a "tax matters partner" ("TMP") to act as a liaison between the IRS and the partnership in any tax-related proceedings. 26 U.S.C. §6231(a)(7)(A); *Addington v. Commissioner*, 205 F.3d 54, 60 (2nd Cir.2000). The TMP is a fiduciary to the partnership and the individual partners. *Transpac Drilling Venture 1982-12 v. Commissioner*, 147 F.3d 221, 225 (2nd Cir.1998).

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[6] A partner may request administrative adjustments of the partnership return, 26 U.S.C. §6227, from which judicial review by the taxpayer is permitted, *Id.* §6228.

[7] Subtitle A is the subtitle of the Internal Revenue Code, 26 U.S.C. §1 et seq., setting forth items subject to federal income taxes.

The IRS has three years from the date a partnership return is due to be filed in which to issue an FPAA. 26 U.S.C. §6229(a). The three-year period may be extended by agreement between the IRS and the TMP, whose agreement binds all partners. *Id.* §§6229(b), 6229(d). It is this three year limitations period that is in issue in this case.

For ninety days following issuance of an FPAA, the TMP has the exclusive right to file a petition for readjustment of the partnership items in Tax Court, the Court of Federal Claims, or a United States District Court. *Id.* §6226(a). Thereafter, non-TMP partners have 60 days in which to file a petition for readjustment. *Id.* §6226(b)(1).

Partners whose tax liability may be affected by the outcome of litigation of partnership items have the opportunity to participate in the administrative proceeding. 26 U.S.C. §§6224(a), 6226(c);*Chimblo*, 177 F.3d at 121. The IRS may assess tax liability on individual partners only after the partnership tax determination has been made. Any such assessment must be made within one year from the date any court's decision on the partnership items becomes final. 26 U.S.C. §6229(d). A taxpayer may contest the notice of deficiency by paying the assessment and then filing a refund action in a United States District Court. However, with limited exceptions not applicable here, "[n]o action may be brought [in District Court] for a refund attributable to partnership items." *Id.* §7422(h).

Partnership items convert to nonpartnership items through a settlement agreement between the IRS and the individual partner with respect to such items. *Id.* §6231(b)(1)(C). If an individual partner settles his partnership tax liability with the IRS before the partnership proceedings are completed, that partner may no longer participate in the partner level litigation, since the individual partner does not have an interest in that litigation. *Id.* §6228(a)(4). That settling partner is bound

under the terms of the settlement agreement with the IRS. *Id.* §6224(c)(1). If a partnership item is converted to a nonpartnership item pursuant to a settlement, the jurisdictional bar of §7422(h) no longer applies. *Alexander*, 44 F.3d at 331; *Slovacek v. United States*, 40 Fed. Cl. 828, 830 (1998).

III. ANALYSIS

A. Summary Judgment Standards

Both Weiner and the IRS have moved for summary judgment on the statute of limitations issues for the 1984 and 1985 tax years and on Weiner's claim for a refund of interest assessed under §6621(c) for the tax years 1984, 1985, and 1986. The United States Supreme Court has held that a motion for summary judgment is properly granted unless there is evidence "on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict ...." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Wheeler v. Miller*, 168 F.3d 241, 247 (5th Cir.1999). Rule 56 is an integral part of the Federal Rules of Civil Procedure, recognizing a party's right to demonstrate that certain claims have no factual or legal basis and to have those unsupported claims disposed of prior to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the movant shows that there are no genuine issues of material fact, the burden is on the nonmovant to demonstrate with "significant probative evidence" that there is an issue of material fact warranting a trial. *Texas Manufactured Housing Ass'n v. Nederland*, 101 F.3d 1095, 1099 (5th Cir.1996). The nonmovant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla

of evidence. *Doe v. Dallas Independent School Dist.* , 153 F.3d 211, 215 (5th Cir.1998); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (*en banc*).

The Court "must review all of the evidence in the record, but make no credibility determinations or weigh any evidence." *Peel & Company, Inc. v. The Rug Market* , 238 F.3d 391, 394 (5th Cir.2001) (*citing Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). "Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless." *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir.1991). Rumors, speculation, hearsay and other information which would be excluded at trial cannot be considered in ruling on a motion for summary judgment. *Fowler v. Smith*, 68 F.3d 124, 126 (5 th Cir.1995). In the absence of proof, the Court will not assume that the nonmovant could or would prove the necessary facts. *See McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.* 66 F.3d 89, 92 (5th Cir.), *revised on other grounds on denial of reh'g*, 70 F.3d 26 (5th Cir.1995); *Little*, 37 F.3d at 1075.

B. Subject Matter Jurisdiction

Neither party contests this Court's subject matter jurisdiction over the FPAA limitations issue. Nevertheless, the Court has a continuing obligation to ensure that subject matter jurisdiction in fact exists over the issues it decides. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir.), *cert. denied*, 534 U.S. 993, 122 S.Ct. 459, 151 L.Ed.2d 377 (2001). Although the facts Weiner alleges in support of his statute of limitations claims differ for the tax years 1984 and 1985, the jurisdictional analysis is the same for each. The Court reluctantly concludes that it has jurisdiction to determine the statute of limitations issues presented by Weiner in this case, despite the apparent inconsistency of this holding

with the logic and structure generally of TEFRA. This result is driven by a strict construction of TEFRA's statutory language, which other courts have not explicitly addressed, and the governing Treasury Regulations.

Generally, this Court has jurisdiction over a taxpayer's refund action under 26 U.S.C. §§1340, 1346(a)(1) and 7422(a).[8] *See Alexander*, 44 F.3d at 330-31. Under TEFRA, however, the Court does not have subject- matter jurisdiction over a refund attributable to partnership items. 26 U.S.C. §7422(h).

Weiner agrees with these basic propositions but contends that this Court has jurisdiction to consider, and must consider, the issue of the timeliness of the FPAA as to TFA and his other partnerships. [9] Weiner essentially contends that the §6229(a) three-year limitations period for issuance of a FPAA is a nonpartnership item under TEFRA

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[8] Section 7422(a) provides:

> **No suit prior to filing claim for refund.**— No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. §7422(a).

[9] Under TEFRA, the FPAA tolls the three-year statute of limitations for assessing any deficiency set by 26 U.S.C. §6229(a) if the FPAA is issued within the three-year period established by that section. 26 U.S.C. §6229(d). Thus, for every partnership return, there is a fixed, statutorily defined deadline for issuance of the FPAA.

that must be litigated in a partner's refund proceeding.[10] The IRS provides no substantive counter-arguments, despite having been requested to do so in a parallel lawsuit.[11]

Several courts have held that a statute of limitations defense under TEFRA pertaining to the timeliness of the FPAA concerns a partnership item and must be raised at the partnership level. *Chimblo*, 177 F.3d at 125; *Kaplan*, 133 F.3d at 473; *Williams v. United States*, 165 F.3d 30 (6th Cir.1998) (Table), 1998 WL 537579, at *3 ("It is well established that [FPAA] statute of limitations challenges are considered challenges to a partnership item."); *Clark v. United States*, 68 F.Supp.2d 1333, 1344 (N.D.Ga.1999); *Thomas v. United States*, 967 F.Supp. 505, 506 (N.D.Ga.1997); *Barnes v. United States*, 1997 WL 732594, at *3 (M.D.Fla.1997), *aff'd* 158 F.3d 587 (11th Cir.1998) (holding that the issue of whether a partnership had extended the FPAA limitations period was a partnership item under TEFRA); *Slovacek v. United States*, 36 Fed. Cl. 250, 255 (1996) ("whether a statute of limitations applicable to the partnership as a whole was waived so as to permit assessment of additional taxes against the partnership as

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[10] In *Kraemer v. United States*, Civil No. H-00-2948, 2002 WL 575791, Magistrate Judge Nancy Johnson, held that the District Courts lack jurisdiction over Weiner's limitations claims. Magistrate Judge Johnson relied on appellate and other authorities discussed later in this section of this Memorandum Opinion ("Opinion"). Because of the strength of Magistrate Judge Johnson's reasoning, this Court informed the parties that the memoranda of law filed at the invitation of Magistrate Judge Johnson in the *Kraemer* case would be considered by this Court because the FPAA limitations jurisdictional issue appears to be identical in these suits. See Order, dated February 28, 2002 [Doc. # 62]. Kraemer made several arguments in response to the *Kraemer* opinion. See Plaintiff's Motion for Reconsideration Regarding 1984 Statute of Limitations Jurisdictional Issue [Doc. # 46], at 2-4.

[11] See supra note 10.

a whole is an issue to be decided at the partnership level, since it affects all partners alike.").[12] The Court finds the reasoning of these cases persuasive, as far as it goes. Most of the opinions adopt the analysis in Slovacek, in which the Court of Federal Claims noted that "TEFRA distinguishes between tax determinations and items that affect the entire partnership ('partnership items') and those that depend, instead, upon the unique circumstances of a partner, or some other nonpartnership-wide variable ('nonpartnership items'). For example, the question of whether a partner must pay tax on a sum she receives from the partnership upon her termination is a nonpartnership item." 36 Fed. Cl. 250, 254 (Fed.Cl.1996). The Slovacek court determined that the FPAA limitations issue is encompassed by the regulatory definition of "partnership item" found in Treasury Regulation §301.6231(a)(3)-1(b), which provides

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[12] Potentially pertinent here is Weiner's argument made in another context (the fairness of applying collateral estoppel) that §6226(d) was amended in 1997, so that for tax years prior to 1997 the Tax Court lacked jurisdiction to decide the statute of limitations issue in a partnership proceeding, or at least that jurisdiction was questionable. The Court disagrees with Weiner's analysis of the amendment. First, the amendment's clarification of jurisdiction does not mean that the Tax Court previously lacked jurisdiction. Congress likely perceived an ambiguity on the issue and sought to remove any doubt about congressional intent. Second, Weiner's argument conflates statutes of limitations issues applicable only to an individual partners (such as whether the IRS's assessment of a deficiency came more than one year after his settlement), *see Treaty Pines Invest. Partnership*, 967 F.2d at 210, with the limitations governing issuance of the FPAA for an entire partnership, which is the same for all partners and seems to be a quintessential partnership matter. *See Chimblo*, 177 F.3d at 125. Moreover, the Tax Court routinely exercised jurisdiction over the partnership statute of limitations issue prior to the 1997 amendment. *See, e.g., Alexander*, 44 F.3d at 330 (the Tax Court entered judgment for certain partners based on statute of limitations). Thus, the Court concludes that the 1997 amendment clarifying the Tax Court's jurisdiction over statute of limitations issues plays no role in the jurisdictional analysis at hand.

that "[t]he term 'partnership item' includes the accounting practices and the legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc." *Id.* at 255. The court reasoned that "determining whether [the purported TMP] extended the statute of limitations might be said to affect the amount, timing, and characterization of income, etc. (partnership items) at the partnership level, if only in a thumbs-up or thumbs-down manner. Conversely, a statute of limitations issue applicable only to an individual partner involves questions of fact pertinent only to that partner, *e.g.*, whether he extended the statute of limitations for his own return, see I.R.C. §6229(b)(1)(A), or timely entered into a settlement agreement solely with respect to the partner's return, see IRC §6229(f), or participated in preparing a fraudulent partnership return, see IRC §6229(c)(1)(A)." *Id.* at 255. This reading of the interplay between §6231(a) and Treasury Regulation §301.6231 is consistent with TEFRA's goal of promoting consistency and reducing duplication of litigation as to issues that affect all partners in a partnership uniformly. *Id.* at 254.[13] Recent appellate cases

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[13] This case is distinct from *Monti v. United States*, 223 F.3d 76, 82 (2nd Cir.2000), and *Prochorenko v. United States*, 243 F.3d 1359, 1363 (Fed.Cir.2001), cited in the *Kraemer* Motion for Reconsider. *Monti* and *Prochorenko* hold that a partner's right to request a consistent settlement under §6224(c)(2) is not a partnership item. The Second Circuit explained:

> One partner's right to settlement terms consistent with those granted to another partner is not a partnership item, because the question posed requires consideration of the relationship between one partner's situation and another's and the individual's, rather than the partnership's, communications with the IRS. The facts needed to determine whether consistent terms were offered are facts about the partner, not facts about the partnership.

have adopted this approach in interpreting the definition of "partnership item" to include the issue of whether the FPAA was timely, an item that affects the entire partnership and does not depend on the unique circumstances of the partner seeking a refund. *Chimblo*, 177 F.3d at 125; *Kaplan*, 133 F.3d at 473.

Weiner contends that these authorities are wrongly decided and should not be followed. Weiner points to various statutory provisions applicable to partner-specific statute of limitations defenses. These references are irrelevant. Weiner in the case at bar raises no partner-specific facts in support of his statute of limitations contentions. The only question here is whether the FPAAs as to his partnerships were issued more than three years after the filing of the partnership returns, and thus failed to toll the statute of limitations on assessments of deficiencies against Weiner. Under TEFRA's scheme, this FPAA limitations issue is one that affects the partnership as a whole and all the partners in the same manner; the issue does not involve partner specific facts. Under TEFRA's philosophy, the FPAA limitations issue should not be relitigated in this Court in an individual partner proceeding. *See Monti v. United States*, 223 F.3d 76, 79 (2nd Cir.2000); *Chimblo*, 177 F.3d at 125; *Kaplan*, 133 F.3d at 473.

Weiner advances, however, an argument not fully addressed by Slovacek and its progeny. Weiner points out that "partnership item" in the IRC is a defined term. Section 6231(a)(3) defines a partnership item as "any item required to be taken into account for the partnership's

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Monti, 223 F.3d at 82 (cited in *Prochorenko*, 243 F.3d at 1363). As the Court has explained, the specific statute of limitations issue raised by Weiner does not require consideration of the relationship between one partner's situation and another's or the individual partner's communications with the IRS.

taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level." (Emphasis added.) According to this definition, the item must also be included in subtitle A of the IRC and be the subject of regulations promulgated by the Secretary. The deadline for issuing a timely FPAA is contained in §6229(a), which is located in subtitle F of the IRC (as is all of TEFRA). No Treasury Regulation specifically identifies the timeliness of an FPAA as a matter "more appropriately determined at the partnership level than at the partner level." 26 U.S.C. §6231(a)(3). The Slovacek court attempted to resolve this definitional quandary by reference to Treasury Regulation §301.6231(a)(3)- 1. Slovacek undertook an aggressive reading of the language of that regulation. Contrary to that court's analysis that the regulation encompassed the "thumbs up, thumbs down" issue of the timeliness of the FPAA, the limitations question is not of the same ilk as matters listed in §301.6231(a)(3)-1. That regulation gives as examples of partnership items "the partnership's method of accounting, taxable year, and inventory method; whether an election was made by the partnership; whether partnership property is a capital asset, section 1231 property, or inventory; whether an item is currently deductible or must be capitalized; whether partnership activities have been engaged in with the intent to make a profit for purposes of section 183; and whether the partnership qualifies for the research and development credit under section 30." Thus, §301.6231(a)(3)- 1 was designed to cover more specific matters that affect the particulars of the tax due, and while the Slovacek court's analysis reaches a logical result, it is unsupported by the applicable regulations.

The Slovacek court also failed to confront directly the statutory limitation of IRC §6231(a)(3) that partnership

items are "any item required to be taken into account for the partnership taxable year under any provision of subtitle A [of the IRC]." The FPAA limitations provision appears only in subtitle F. Therefore, the other element of the IRC's definition of "partnership items" is not met by the Slovacek analysis.

According to the plain meaning of the statutory language, an item does not become a "partnership item" simply because it affects the partnership as a whole and is more appropriately decided at the partnership level. This Court has jurisdiction over timely filed refund actions unless specifically restricted by statute. Congress has limited this Court's jurisdiction in partnership related refund actions only through IRC §7422(h), which precludes the exercise of jurisdiction over partnership items as that term is defined by §6231(a)(3). To the extent that Weiner's FPAA limitations claim involves a nonpartnership item, §7422(h) does not apply and the Court has jurisdiction over the matter. The IRS has provided no pertinent counter-argument.

This result is driven also by the Fifth Circuit's admonition that courts should not attempt to compensate for poorly drafted IRC provisions and regulations. *Transco Exp. Co. v. Commissioner* , 949 F.2d 837, 840-41 (5th Cir.1992) ("This court and others have balked in the past at revision of the tax code to reach what appears to be a more sensible result.... Courts are particularly ill-equipped to overhaul complicated tax provisions whose function in the general tax scheme is often beyond their ken.") (citations omitted).

In summary, the Court is constrained to hold that it has jurisdiction to reach the FPAA limitations issues presented by Weiner despite strong appellate authorities disclaiming jurisdiction. Moreover, in light of the complexity of these issues, the uncertainty of the courts on these matters, and

the inordinate delay that has already occurred since the tax years in issue, the parties' interests and judicial economy will be served by the Court reaching the merits of the parties' motions for summary judgment on Weiner's statute of limitations claims.

C. Effect of Weiner's Form 870-P(AD) Settlement: Analysis of Alexander

Weiner argues that his 1997 settlement agreements, executed on Forms 870- P(AD), do not preclude him from pursuing in this Court his refund claims based on the expiration of the statute of limitations. Weiner relies on the Fifth Circuit's ruling in *Alexander*.

General contract principles govern the interpretation of the settlement agreement. *See Alexander*, 44 F.3d at 332; *Treaty Pines Invest. Partnership v. Commissioner*, 967 F.2d 206, 211 (5th Cir.1992). Weiner's Form 870-P(AD) settlements are virtually identical to the Form 870-P that the Fifth Circuit addressed in Alexander. The Fifth Circuit held that Alexander's settlement did not bar his refund action claim which, like Weiner's, was based on the theory that the FPAA issued to Alexander's partnership was untimely. *Id.* The IRS has articulated no meaningful distinction between the settlement agreements in Alexander and the instant case. The Court concludes that the parties did not settle Weiner's statute of limitations claims by the Forms 870-P(AD).[14]

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[14] The IRS initially conceded that Weiner's claim was permissible under Alexander, but retracted that concession in its Supplemental Reply Brief. The IRS now argues that the Form 870-P(AD) signed by Weiner is similar to the settlement agreement in *Tollerson v. Commissioner Service*, 1993 WL 174884 (S.D.Tex. March 4, 1993), *aff'd*, 21 F.3d 1108 (5th Cir.1994), which was cited with approval in Alexander as an example of a case in which the express terms of the settlement agreement precluded the plaintiff's refund claim. *Alexander*, 44 F.3d at 333. However, the issue in *Tollerson* was whether the plaintiff's settlement agreement barred a

Although the Court has determined that it has jurisdiction over the FPAA limitations issue, it believes that the more logical result would require litigation of the issue in a partnership-level proceeding. In the event the court of appeals were to agree with its sister circuits and adopt the reasoning of *Slovacek*, the court of appeals would have to analyze whether a finding of lack of jurisdiction is contrary to the holding of *Alexander*. This Court concludes that nothing in *Alexander* bars this Court from deciding that it lacks jurisdiction over Weiner's claim.

Taxpayer Alexander sued the IRS for a refund of taxes that were assessed and collected after the expiration of the limitations period. *Alexander*, 44 F.3d at 329. In May 1988, the IRS sent Alexander an FPAA relating to a 1984 partnership return that resulted in increased tax liability on his individual 1984 taxes. *Id.* The IRS also invited Alexander, through a Form 870-P, to make an offer, by signing the 870-P, to enter into a binding settlement to accept the adjustments in the FPAA. *Id.* Alexander made the offer, the IRS assessed a deficiency one year later, and Alexander paid the deficiency plus interest. *Id.* at 330. One year after the payment, Alexander learned that another partner had successfully challenged the FPAA in Tax Court on the grounds that it was barred by the statute of limitations. Alexander sued the IRS in United States District Court for a refund of the deficiency he paid relating

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refund action based on lack of proper notice of a deficiency assessment of penalties and interest. *Tollerson v. Commissioner*, 1993 WL 174884, at *3-4 (S.D.Tex.1993). The court found that by signing the Form 870-P, the Tollersons agreed, among other things, to waive notice of a deficiency. Weiner has submitted certified copies of the forms at issue in *Alexander* and *Tollerson*. The determinative language in the 870-P in *Tollerson* is not present in the Form 870-P(AD) signed by Weiner. However, the Form 870-P(AD) signed by Weiner is nearly identical to the Form 870-P issue in *Alexander*. Thus, *Tollerson* is not controlling on the issue before the Court.

to the 1984 partnership return. *Id.*[15] The IRS did not dispute the validity of the settlement agreement. Id. at 331.

The Fifth Circuit held that federal district courts have jurisdiction over refund claims generally. *Id.* at 330-31 (citing 28 U.S.C. §1346). The court of appeals identified the "critical inquiry" on jurisdiction as "whether the refund action here is attributable to partnership or nonpartnership items." *Id.* at 331 (footnotes discussing 28 U.S.C. 1346, and 26 U.S.C. §§6231(a)(3) and (a)(4) omitted). The Court noted that "the purpose of Section 7422(h) is evidently to prevent an individual partner's refund action from interfering with the partnership-level determination of partnership items," and "that bar becomes unnecessary when the partnership-level proceeding has in some sense concluded." Id. at 331. The Court further noted that section 6231(b)(1)(C) ... converts partnership items into nonpartnership items when the Secretary enters into a settlement agreement with the partner with respect to such items." *Id.* The Court therefore concluded that the district court had subject matter jurisdiction over Alexander's refund claim. *Id.* at 331.

The court of appeals thereafter addressed the contract issue before it, and held that the parties' settlement agreement did not resolve the limitations question. The court perceived the refund action was based "on the time-barred deficiency assessed as a result of [treatment of partnership items]."*Id.* at 332. In sum, the *Alexander* court concluded that the district court had subject-matter jurisdiction to entertain Alexander's refund action, and that Alexander was entitled to the refund he sought. *Id.* at 333.

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[15] The opinion does not reveal when the partnership level Tax Court proceeding was initiated, but apparently that suit was resolved in the partners' favor before Alexander filed his refund suit.

As noted above, several courts since *Alexander* have analyzed TEFRA and concluded that the FPAA statute of limitations (26 U.S.C. §6229(a)) is a partnership item. *E.g.*, *Chimblo*, 177 F.3d at 125; *Kaplan*, 133 F.3d at 473. In contrast, the *Alexander* Court performed no analysis of whether the limitations issue--having been omitted from the settlement agreement--remained a partnership item.[16] The only jurisdictional question presented in *Alexander* was whether the district court had jurisdiction to determine the scope of Alexander's settlement agreement with the IRS. The IRS's challenge in Alexander also focused on the scope of the parties' settlement, not on the classification under TEFRA of a contested FPAA limitations issue.[17] The Fifth Circuit did not explicitly recognize that the FPAA statute of limitations constituted a partnership item. The court of appeals did not need to parse this issue because the IRS had conceded that the assessment was time-barred. Significantly, the Fifth Circuit remanded the *Alexander*

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[16] The Court, although it found that "the adjustments to the partnership items are firm and binding," simply declared "that the settlement agreement does not by its terms preclude a refund action for amounts paid after the expiration of the statute of limitations on assessment" and "any assessment of a deficiency based on those adjustments was time-barred." *Alexander*, 44 F.3d at 332. The court was not presented with the precise issue here, i.e., whether under TEFRA and the district court's general jurisdictional grant, the FPAA timing issue may be litigated by an individual partner in district court.

[17] The Fifth Circuit admonished the IRS for its failure "to draft an agreement which by its terms would preclude the action at issue." *Alexander*, 44 F.3d at 333. Once the Court of Appeals concluded that Alexander's settlement did not encompass the limitations issue, and recognized that the IRS made no other arguments to oppose the refund, judicial economy was served by the Court immediately resolving the entire litigation.

case for entry of judgment in favor of Alexander, not for litigation of the statute of limitations issue. Id. at 333.[18]

Weiner's claim for a refund of his 1984 taxes under TEFRA raises a question not reached by *Alexander*. He and the IRS seek to litigate fully the FPAA limitations issue, as evidenced by parties' extensive briefing by the parties on the matter. Unlike in *Alexander*, the IRS does not concede that the limitations period expired for any of the partnerships at issue before April 10, 1991, when the FPAAs were issued. The issues presented here, therefore, were not in fact decided by *Alexander*.[19]

The result in *Alexander*, under the circumstances of that case, accords with the purpose of TEFRA, i.e., consistent treatment of partnership issues. Weiner's position, in contrast, is incompatible with TEFRA's goals. There is a danger that allowing Weiner individually to pursue this FPAA limitations claim opens the door for every partner that settled using a Form 870-P(AD) to pursue the issue, giving rise to duplicative litigation and potentially inconsistent results. "Allowing individual taxpayers to raise a statute of limitations defense in multiple partner-level proceedings would undermine TEFRA's dual goals of centralizing the treatment of partnership items and ensuring the equal treatment of partners." *Chimblo*, 177 F.3d at 125.

Barring Weiner's relitigation of the FPAA limitations issue would not be unfair. Weiner had the opportunity to pursue the limitations issue in the partnership Tax Court

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[18] A further potential distinction is that the partners' claims in the Consolidated Tax Court Case were rejected by the Tax Court. Thus, Weiner seeks to litigate issues that others in a comparable position previously attempted unsuccessfully.

[19] The holding in *Alexander* as to the district court's jurisdiction should be limited to the specific issues and circumstances before that court.

Cases from 1991 onward. Because he did not settle with the IRS until March 1997, he had the right to pursue the limitations issue in the Tax Court Cases until at least that time. Indeed, under the *Alexander* contract analysis, which the Court adopts, Weiner did not settle the limitations issue with the IRS in the Forms 870-P(AD), and thus he likely retained his rights as a partner to participate in the Tax Court Cases on that issue irrespective of his settlements. Weiner now wants the best of both worlds; he sought to limit his liability for the tax obligation arising from the partnerships while sitting on the sidelines of the partnership Tax Court litigation. Then, dissatisfied with the Tax Court ruling, he seeks to revisit the same issue on an individual basis. Weiner would have had plenty of time to air his limitations arguments and to participate actively in the partnership litigation, had he chosen to do so. Indeed, it was individual partners who initiated each of the Tax Court Cases. The TMP for the partnerships did not enter into the Stipulation To Be Bound until 1999, long after Weiner settled his individual liability related to the partnerships.

Nevertheless, as explained above, the Court feels compelled to address the merits of the FPAA limitations issues raised by the parties.

D. Weiner's 1984 Statute of Limitations Claim

The IRS argues that collateral estoppel prohibits Weiner from asserting that the assessment was barred by the statute of limitations, and in the alternative, that the statute of limitations was not triggered by the 1984 return because that return was not signed by a partner as required by 26 U.S.C. §6063. Weiner makes various detailed rejoinders to each of these arguments. Weiner contends that collateral estoppel does not apply because, among other things, the statute of limitations issue here is not identical to that in the prior Tax Court case, and the issue was not

fully and fairly litigated in the Tax Court because the TMP suffered from a conflict of interest. The applicability of collateral estoppel is a close issue. Under traditional issue preclusion theory, collateral estoppel would apply. However, this is a tax case, and the more restrictive tenets applicable in the tax setting dictate that Weiner should not be precluded from litigating the FPAA limitations on the basis of collateral estoppel because the limitations issues here have not been shown by the IRS to be in all respects identical to those in the *Agri-Cal* case.

1. Collateral Estoppel

The Court generally has broad discretion to determine whether collateral estoppel should be applied to preclude litigation of an issue. *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1423 (5th Cir.1995); *J.M. Muniz, Inc. v. Mercantile Texas Credit Corp.*, 833 F.2d 541, 543 (5th Cir.1987). Collateral estoppel bars the relitigation of an issue of ultimate fact by the party against whom the issue has been determined by a valid and final judgment. *Hibernia Nat'l Bank v. United States*, 740 F.2d 382, 387 (5th Cir.1984). While mutuality of parties is not required, collateral estoppel can only be applied against parties who have had a prior full and fair opportunity to litigate their claims. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir.1982) (*explaining Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)).

Collateral estoppel traditionally applies when three conditions are met: (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case. *Hibernia*, 740 F.2d at 387; *Next Level Communications LP v. DSC Communications Corp.*, 179 F.3d 244, 250 (5th Cir.1999). The Fifth Circuit has recognized a fourth requirement for offensive use of collateral estoppel: whether

there is any special circumstance that would make it unfair to apply the doctrine.*Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 391 (5th Cir.1998).

In tax cases, the rule is more narrow. Application of collateral estoppel should be confined to situations where the matter raised in the second suit is identical in all respects to that in the prior proceeding and where there has been no change in controlling facts and applicable rules of law. *Hibernia*, 740 F.2d at 387 (*citing Commissioner v. Sunnen*, 333 U.S. 591, 599-600, 68 S.Ct. 715, 92 L.Ed. 898 (1948)).

The IRS contends that the decision in the*Agri-Cal* case, to which the TMP of TFA agreed to be bound pursuant to the Stipulation, meets each of the four factors listed above. Weiner, not unexpectedly, disagrees.

Weiner's Full and Fair Opportunity to Participate in Agri-Cal.— The Court must determine the threshold question whether collateral estoppel may be invoked by the IRS against Weiner to bar his refund claim even though it is undisputed that neither he nor TFA was a party to the *Agri-Cal* case. Although the TMP of TFA was also TMP of the partnerships involved in *Agri-Cal*, he was not acting in his capacity as a fiduciary to TFA or Weiner in the*Agri-Cal* litigation. Thus, if collateral estoppel is to bar Weiner's claim as to his involvement in TFA, it must be by virtue of the TFA Tax Court Case.

On July 19, 2001, the Tax Court in the TFA case entered an agreed decision pursuant to the parties' settlement, which was based on the TMP's Stipulation that the statute of limitations issue in the TFA case would be determined in a manner consistent with the decision in *Agri-Cal* . Collateral estoppel generally does not preclude the relitigation of issues resolved through a consent judgment because such judgments lack a judicial determination of issues. *Avondale Shipyards, Inc. v. Insured Lloyd's* , 786

F.2d 1265, 1272-73 (5th Cir.1986); *see Dotson v. United States*, 87 F.3d 682, 692 (5th Cir.1996) (Smith, J. concurring in part and dissenting in part) (noting party could not assert collateral estoppel where prior court had not actually and necessarily decided the relevant issue before settlement). Because the statute of limitations issue was not actually litigated in the TFA Tax Court Case, the IRS must establish a nexus between Weiner and the *Agri-Cal* case in order for that case to be the source of collateral estoppel here.

The IRS seeks to provide the necessary nexus by relying on the Stipulation To Be Bound signed on behalf of TFA. That Stipulation was an agreement by the TMP of TFA to determine the statute of limitations issue in the TFA case "in a manner consistent with the Court's findings of fact and law on the statute of limitations issues present" in the *Agri-Cal* litigation. Weiner counters that the Stipulation should not be binding because the TMP had a conflict of interest and the Stipulation was entered into in 1999, years after Weiner settled with the IRS, when he no longer had the right to participate in the TFA or *Agri-Cal* Tax Court Cases.

Even though the Court holds that the FPAA limitations issue is a nonpartnership item, the Stipulation entered into in the partnership proceedings nevertheless may provide a sufficient nexus between Weiner and the *Agri-Cal* case to meet the threshold requirement for application of collateral estoppel. There are strong arguments to support such a result. Weiner had notice of and an opportunity to participate in the TFA Tax Court Case. Weiner has not shown that he was in a materially different position from the other partners or the partnership itself on the FPAA limitations issue in 1999 when TFA's TMP entered into the

Stipulation.[20] Weiner's arguments that the TMP had a conflict of interest in 1999 when he entered into the Stipulation for TFA are unsubstantiated in this record.[21] Nevertheless, the Court declines to definitively decide the issue on this limited record. Rather, the Court assumes without deciding that Weiner was in privity with a party, namely, the TMP of TFA, in the prior litigation.[22]

The IRS still must meet its burden to establish that the traditional four elements of collateral estoppel are met in this case.

Are the Issues Identical?—The IRS contends that the Stipulation amounts to a concession by the TMP that the statute of limitations issues raised in the TFA Tax Court Case and the *Agri-Cal* case were identical, and that those issues are identical with the issues raised here. As Weiner points out, considerations other than the identity of the issues, such as economics and strategy, certainly could have played a part in the TMP's decision to enter the Stipulation in the TFA litigation. However, these concerns do not address the question here, i.e., whether the FPAA

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20 Weiner elected to settle his claim with the IRS. He had the choice to participate in the Tax Court Case but chose not to. His position that the settlement distinguishes him from other in the partnership on this basis does not serve to eliminate his posture as a partner in privity with the TMP.

21 Although the exact dates of the investigation are not clear from the record, the criminal investigation concluded several years before 1999.

22 If the Court were to hold that the FPAA limitations issue raised by Weiner is a partnership item, the Court would also hold that the Stipulation was binding on Weiner. If the FPAA limitation issue were a partnership item, then the item would not convert to a nonpartnership item when Weiner entered his settlement with the IRS, because the settlement did not cover the limitations issue. There would be no basis on which to hold that Weiner would not be bound by the actions of the TMP regarding that limitations issue.

limitations issue in *Agri-Cal* are identical to those in this case. The Court need not discern the subjective intent of the TMP. Rather, the Stipulation's language must be the focus. The Stipulation provides that the limitations issue for TFA would be determined "in a manner consistent with" the rulings in *Agri-Cal* . The Stipulation does not dictate that the TFA litigation will be resolved by the *Agri-Cal* result per se. The Stipulation itself does not prove that the issues are identical.

To determine if collateral estoppel applies, the Court must look carefully at the facts actually proven in support of the various partnerships' statute of limitations issues in *Agri-Cal* as compared to the facts of the current case to assess whether the issues are completely the same. In tax cases, the requirement for collateral estoppel that there be an identity of issues is interpreted very narrowly. *See Hibernia*, 740 F.2d at 387. The issue must be identical in all respects. Id.

The Supreme Court addressed an analogous issue in *Commissioner v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948). Sunnen addressed the collateral estoppel effect of a Board of Tax Appeals decision classifying royalties paid to a taxpayer's wife pursuant to a licensing agreement as taxable income to the taxpayer in a later Tax Court case involving royalties paid in subsequent tax years pursuant to a separate but identical licensing agreement. *Id.* at 596-97, 68 S.Ct. 715. The Supreme Court explained the applicable standard as follows:

> [W]here a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. And if the very same facts and no others are involved in the second case, a case relating to a different tax year,

> the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they may be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.

Sunnen, 333 U.S. at 601, 68 S.Ct. 715 (citation omitted; emphasis added). The *Sunnen* Court found it "readily apparent" that collateral estoppel should not apply to royalty payments growing out of licensing contract that were not at issue in an earlier Board of Tax Appeals action "even though those contracts are identical in all important respects with the 1928 contract, the only one that was before the Board, and even though the issue as to those contracts is the same as that raised by the 1928 contract. For income tax purposes, what is decided as to one contract is not conclusive as to any other contract which is not then in issue, however similar or identical it may be." *Id.* at 602, 68 S.Ct. 715.

Here, the *Agri-Cal* case and current case involve different partnerships, different partnership returns, and different taxpayers. *Agri-Cal* involved seven partnerships, five of which argued that the FPAAs at issue were not timely because they were issued after the expiration of the §6229(a) assessment period. 80 T.C.M. (CCH) at 296, 2000 WL 1211147. AVA was one of the five partnerships. As to AVA, the IRS successfully argued that no valid tax return was filed for the 1984 tax year because the return was not signed by a partner in conformity with 26 U.S.C. §6063. *Id.* at 301, 2000 WL 1211147.

Although the material facts about the partnerships in *Agri-Cal* and TFA in the instant case are very similar, they are clearly separable. The involvement of different partnerships in the tax disputes here is analogous to the

distinct but identical contracts involved in *Sunnen*. Also, Weiner's posture as a settling partner may distinguish this case factually from the taxpayer partners in *Agri-Cal*. Thus, under *Sunnen*'s reasoning, the issues presented here are not identical for purposes of collateral estoppel.[23]

Was the Issue Fully And Vigorously Litigated?—Weiner asserts that the FPAA limitations issue was not fully and vigorously litigated in the Tax Court. This argument is unavailing. Weiner's desire to raise new arguments that could have been but were not made before the Tax Court does not defeat the fully and vigorously litigated element of collateral estoppel. *See Yamaha Corp. v. United States* , 961 F.2d 245, 254 (D.C.Cir.1992) ("Once an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case."). Plaintiff may not raise new arguments in the second litigation even if they were not made in the first; as long as

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[23] But for the restrictive approach dictated by *Sunnen*, this Court likely would find that the issues are identical. Weiner has failed to show the existence of any genuine issues regarding material factual distinctions between the circumstances of Voyer's signing the TFA 1984 return and his signing the AVA 1984 return in issue in *Agri-Cal*. Indeed, Weiner's arguments regarding TFA largely repeat those asserted by the taxpayers and TMP for the AVA in the *Agri-Cal* litigation. As with TFA, the AVA 1984 return was signed by "Joseph A. Voyer, Treasurer." *Id.* AVA argued, as does Plaintiff here, that AMCOR was a partner in AVA at the time the 1984 return was signed; that AMCOR was authorized to sign the 1984 return as AVA's agent or because the partners in AVA ratified the return; that the 1984 return was in substantial compliance with the Internal Revenue Code; and that the IRS accepted the return and therefore should be estopped from attacking its validity. *Id.* at 301-03. Weiner makes the additional fact-based argument that TFA was not a legally formed partnership. It is not clear from the *Agri-Cal* opinion if the facts Weiner alleges regarding the defects in TFA's formation exist with respect to AVA, or if those facts were presented to the Tax Court. However, the Court is unpersuaded that this contention is legally or factually viable. See discussion infra at 646-47.

the argument could have been made it is precluded. *Id.* (*citing Securities Indus. Ass'n v. Board of Governors* , 900 F.2d 360, 364 (D.C.Cir.1990), and RESTATEMENT (SECOND) OF JUDGMENTS §27 cmt. c (1982)).[24]

The Court cannot conclude that the identical issue before this Court was fully and vigorously litigated in the *Agri-Cal* Tax Court case.

Was the Ruling on the Issue Necessary to Support the Judgment? — Weiner contends that many of the arguments he raises here, even though presented to the *Agri-Cal* court, were not the basis for the Tax Court's decision in that case. This contention is without substance. The Tax Court's findings of fact and legal conclusions related to the validity of Voyer's signature on the AVA 1984 return are the basis for that court's ultimate ruling on the FPAA limitations issue. It is that ruling to which the IRS seeks to bind Weiner and which must be necessary to the *Agri-Cal* judgment.

Weiner also argues that the Tax Court issued a Memorandum Opinion but did not issue a final judgment and thus the *Agri-Cal* rulings are not final for purposes of

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[24] The Court is unpersuaded by Weiner's contention that the criminal investigation of the TMP, which investigation ended in 1993, creates a conflict of interest that motivated the TMP not to fully litigate the FPAA limitations issue in the Tax Court. *See Phillips v. Commissioner*, 272 F.3d 1172, 1176 (9th Cir.2001) (criminal investigation does not necessarily disqualify TMP). This case is patently different from *Transpac Drilling Venture 1982-12 v. Commissioner*, 147 F.3d 221 (2nd Cir.1998), on which Weiner relies. Unlike *Transpac Drilling*, the criminal investigation of the TFA general partners ended without any charges being filed. The Stipulation and active litigation in *Agri-Cal* occurred long after the criminal investigation concluded as to the TMP of TFA. Even if Weiner were found to raise a fact issue as to the TMP's motivations or possible misdeeds, resolution of that question is not necessary to the Court's ruling on the collateral estoppel issue, which is based on the lack of identity of the issues.

collateral estoppel. Weiner cites no authority for his position that the rulings were not sufficiently conclusive to support application of collateral estoppel, and the Court is unpersuaded. "For purposes of issue preclusion 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. A decision need not be 'final' in the strict sense of 28 U.S.C. §1291 in order to prevent the involved parties from relitigating contested issues. 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Coleman v. Commissioner*, 16 F.3d 821, 830 (7th Cir.1994) (citations omitted)). Collateral estoppel relates to issue preclusion, not claim preclusion. The Tax Court's *Agri-Cal* ruling as to the validity of Voyer's signature was a decision on the merits. The fact that the *Agri-Cal* parties thereafter settled the case does not change the court's ruling. The Court sees no reason to require a formal final judgment before applying collateral estoppel.

Do Special Circumstances Exist that Make Collateral Estoppel Unfair? —Both parties have identified "fairness" as the fourth requirement for application of collateral estoppel. *See Winters*, 149 F.3d at 391. This element only applies when there is an offensive use of collateral estoppel. *See In re Swate* , 99 F.3d 1282, 1290 (5th Cir.1996) (the requirement of fairness is a limitation on offensive collateral estoppel; offensive collateral estoppel arises when a plaintiff seeks to estop a defendant from relitigating issues that the defendant previously litigated and lost against another plaintiff). Neither party has established that this case presents an issue of offensive collateral estoppel. The IRS, which seeks to benefit from the doctrine, is defending against Weiner's affirmative claim for a refund based on his use offensively of the limitations bar. The Court nevertheless reaches this

element in the collateral estoppel analysis because, in the bigger picture, it is the IRS that claims taxes due from Weiner.[25]

Weiner argues that special circumstances make application of collateral estoppel unfair in this case. Specifically, Weiner argues that fairness dictates that the decision of the Tax Court not be given collateral estoppel effect here because the Tax Court did not have jurisdiction over the statute of limitations issue as it pertains to him individually (because the issue is a nonpartnership item) and because his personal settlement prevented him from participating in or appealing the Tax Court's exercise of jurisdiction over the limitations issue in TFA Tax Court Case or *Agri-Cal*.

As to the effect of the settlement on Weiner's opportunities to litigate the issue in the partnership proceeding, Weiner's contentions are unpersuasive. Weiner argues that his settlement did not encompass the limitations question, and the Court has adopted that reasoning pursuant to Alexander. The settlement per se is therefore not a bar to Weiner's litigating the limitations issue. Moreover, the Court has little sympathy for Weiner's claimed disenfranchisement. Weiner, knowing the TFA Tax Court Case was underway, elected to stay on the sidelines. He chose to settle his tax liability and now claims that he thereby eliminated his eligibility to participate actively in the Tax Court litigation involving TFA. Weiner should have to live with the consequences of his calculated business decisions.

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[25] It could be argued that the posture of the parties here, while somewhat unnatural, should be binding on Weiner because the parties' designation is attributable to Weiner's own choice to pay the assessed taxes and proceed in a refund action in District Court, rather than contest the matters in Tax Court, with or without the other partners.

As to the application of collateral estoppel where Weiner's FPAA limitations claim is a nonpartnership item, assuming the fairness element is relevant at all in this case, the Court concludes that Weiner's inability to participate in the prior litigation may be a "special circumstance." [26] However, because Weiner did not even attempt to participate in the Tax Court litigation knowing that other partners and the TMP were involved, and because Weiner now chooses to advance the philosophy that he was barred earlier, despite any evidence that either the Court or the parties to the Tax Court litigation believed him barred at the time, the Court deems this factor to be of little importance.

Conclusion on Collateral Estoppel. —The Court concludes under *Sunnen*, 333 U.S. at 601, 68 S.Ct. 715, that collateral estoppel does not preclude Weiner's refund claim because the facts giving rise to the decisions on the FPAA limitations issues in *Agri-Cal* are not identical in every respect to the facts presented by Weiner in the instant case. The Court therefore will consider the merits of the statute of limitations claim.

2. Was the 1984 Return Invalid?

The TFA 1984 return was signed by "Joseph Voyer, Treasurer." Voyer was not at the time he signed the return, and never has been, a partner of TFA. He was the Treasurer of AMCOR, the managing agent of TFA. The IRS contends that because the 1984 return was not signed by a partner, it was not a valid return under §6063 and did not trigger the statute of limitations contained in §6229(a). Section 6063 states:

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[26] As noted supra note 12, in relation to the 1997 amendment of §6226(d), the Tax Court has routinely exercised jurisdiction over statute of limitations issues.

> The return of a partnership made under §6031 shall be signed by any one of the partners. The fact that a partner's name is signed to the return shall be prima facie evidence that such partner is authorized to sign the return on behalf of the partnership.

The IRC and case law provide no authority approving the substitution of the signature of an authorized agent who is not a partner on a partnership return. In general, signature requirements for returns have been strictly enforced. *See Burford Oil Co. v. Commissioner*, 153 F.2d 745, 746 (5th Cir.1946) (requirement that a corporate tax return must be sworn to by the president, vice president or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer, is mandatory; return signed only by treasurer is not valid); *Elliott v. Commissioner*, 113 T.C. 125, 128-29, 1999 WL 596946 (1999) (return that did not comply with signature requirements was not valid return and did not trigger running of limitations period for assessment). In at least one case, the Tax Court has strictly enforced the signature requirement of §6063. *Agri-Cal*, 80 T.C.M. (CCH) at 303, 2000 WL 1211147 (finding that the AVA 1984 Form 1065 was not signed by a partner and, consequently, was not a valid partnership return).

Weiner makes several arguments to avoid this patent flaw in the TFA 1984 return. Each will be addressed below.

Estoppel.—Weiner contends that his settlement agreement with the IRS based on the IRS's acceptance of the TFA partnership return and issuance of the FPAA in reliance on it, estops the IRS from defensively attacking the return's validity. Weiner thus seeks to expand the reach of his settlement agreement by asserting that it prevents the IRS from asserting any defenses to an unsettled limitations issue. This position is inconsistent with his basic posture in

this case that the settlement must be construed literally and narrowly, and thus does not preclude his refund claim based on the statute of limitations. Alexander permits Weiner to pursue his refund claim based on the FPAA limitations issue despite his settlement agreement. *See Alexander*, 44 F.3d at 332. The agreement clearly prevents the IRS from altering its position on the amount or nature of Plaintiff's tax liability. However, none of the terms of the settlement bar the IRS from defending itself from Weiner's attack.[27] The IRS makes no affirmative claim to collect more money from Weiner.[28] Nor does the IRS seek to relitigate the value of any partnership items related to TFA's 1984 return. Weiner's argument that his settlement agreement bars the IRS from asserting the invalidity of the 1984 return is rejected.[29]

Invalid Partnership.—Next, Weiner argues that TFA was not a validly formed partnership and thus the signature by a "partner" is not required. Weiner relies on §6233 for the proposition that TEFRA, including its statute of limitations, applies to any entity that files a partnership

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[27] Moreover, it would be grossly unfair to prevent the IRS from asserting the validity of the return in defense of Weiner's limitations issue when the signature validity question is only put in issue as to Weiner because of Weiner's refund claim.

[28] Weiner paid the full assessment and now seeks a refund, *i.e.*, to reduce his tax liability.

[29] The signature requirement of §6063, which is the keystone of the IRS's argument, is contained in subtitle F of the IRC, not subtitle A. Under Weiner's own theory, the signature requirement would not be a partnership item. This provision demonstrates the lack of logic in the literal construction of TEFRA as to "partnership item" excluding the FPAA limitations issue.

return, even if the entity is not actually a partnership. [30] Because TFA was not really a partnership, Weiner reasons, the failure to satisfy the requirement that the entity's return be signed by a partner does not invalidate the TFA 1984 return, and that return should be deemed sufficient under federal law. Weiner's argument is misplaced.

The IRS does not argue that the TFA 1984 return is not governed by TEFRA; the IRS simply argues that the 1984 return did not include a valid signature. Weiner's argument does not demonstrate that Voyer's signature would suffice, even if TFA were not actually a validly formed partnership. While Weiner cites various cases for its contention that TEFRA applies to any entity that files a partnership return, see Plaintiff's Response, at 17 n.38, he cites no case that holds that the signature requirement of §6063 is inapplicable in such a situation. Whether or not TFA was defectively formed, there is no evidence that Voyer, the Treasurer of AMCOR, or AMCOR itself was in a position comparable to a partner in TFA in 1984 or when the 1984 return was filed. Thus, Weiner's argument is unavailing to justify Voyer's signature on the TFA 1984 return.

In any event, §6233 comes into play only if the entity filing a partnership return is not really a partnership.

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[30] Section 6233 provides:

> **(a) General rule.**—If a partnership return is filed by an entity for a taxable year but it is determined that the entity is not a partnership for such year, then, to the extent provided in regulations, the provisions of this subchapter are hereby extended in respect of such year to such entity and its items and to persons holding an interest in such entity.
>
> **(b) Similar rules in certain cases.**—If a partnership return is filed for any taxable year but it is determined that there is no entity for such taxable year, to the extent provided in regulations, rules similar to the rules of subsection (a) shall apply.

Weiner has not demonstrated that TFA in fact was not a true partnership under state law. Weiner contends that the partnership was not validly formed because he signed only a subscription agreement and an assumption agreement, not the actual partnership agreement, and because the partnership agreement was not signed by or on behalf of the limited partners. This argument is faulty. The California Uniform Limited Partnership Act, CAL. CORP. CODE §§15501-15531, governs formation of limited partnerships in California. That Act contains no requirement that a limited partnership agreement must be executed by all partners in order for the partnership to be validly formed. Moreover, Weiner accepted the benefits of partner status, held himself out to others as a partner, participated as a partner in TFA, and settled with the IRS as a TFA partner.

Improper Return Cases: Germantown and Beard.—Weiner cites the cases *Germantown Trust Co. v. Commissioner*, 309 U.S. 304, 307, 60 S.Ct. 566, 84 L.Ed. 770 (1940), and *Beard v. Commissioner*, 82 T.C. 766, 774, 1984 WL 15573 (1984), in support of his position that Voyer's signature was sufficient to make the TFA 1984 return a valid return for limitations purposes. These cases are inapposite. In *Germantown*, the Supreme Court held that when a corporation files an incomplete return in good faith, the return constitutes a return within the meaning of §275(a) of the IRC of 1932, setting a two-year limitations period for a tax assessment. 309 U.S. at 307, 60 S.Ct. 566. The return contained all of the information necessary to compute the corporate tax, but failed to actually compute an amount due to the government. The Court rejected the IRS's contention that the faulty return was "no return" for purposes of determining the applicable limitations period for assessing taxes. *Id.* at 309, 60 S.Ct. 566. However, Germantown did not involve an unsigned or defectively signed return and did not address the mandatory directive in §6063.

Weiner's reliance on *Beard* also lacks merit. In Beard, the Tax Court addressed whether a tampered Treasury Form 1040 was a return at all. If the filed document was not a return under applicable law, then an addition to tax for failure to file a tax return was warranted. *Beard*, 82 T.C. at 774, 1984 WL 15573. The *Beard* court recognized the statutory grant of authority to the Treasury to require that returns be made according to the forms and regulations prescribed by the Secretary of the Treasury, which regulations require use of the proper official form. *Id.* at 775, 1984 WL 15573. Further, the court considered by analogy cases determining whether a document is sufficient for purposes of triggering the statute of limitations. *Id.* at 777, 1984 WL 15573. The *Beard* opinion articulates the following test for determining whether a document is sufficient for statute of limitations purposes: (1) there must be sufficient data to calculate tax liability; (2) the document must purport to be a return; (3) there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and (4) the taxpayer must execute the return under penalties of perjury. Id. Weiner's arguments overlook the fourth element of the *Beard* test. Since Voyer was not a partner of TFA, he was not an authorized signatory for the "taxpayer." None of the cases cited in Beard, or by Weiner, on this point hold a return sufficient that was signed by someone other than one of the taxpayers for whom the return was filed.[31] Voyer was not a partner in TFA. Nor was

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[31] *See Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180, 55 S.Ct. 127, 79 L.Ed. 264 (1934) (a return made inaccurate by supervening changes in the law is not a nullity); *Dowell v. Commissioner*, 614 F.2d 1263, 1267 (10th Cir.1980) (although generally unsigned returns do not commence statute of limitations, acceptance of return by IRS for purposes of fraud case against taxpayers triggered statute), holding rejected by *Evans Cooperage Co. v. United States*, 712 F.2d 199, 204 (5th Cir.1983); *Badaracco v. Commissioner*, 464 U.S. 386, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984) (a fraudulent return is not a "nullity" for statute of limitations purposes; a subsequent, nonfraudulent, amended return does not trigger

AMCOR, the entity for which Voyer was an officer and agent, a partner. The TFA 1984 return thus was not signed by the taxpayer, as expressly required by the Beard test.

Improper Signature Case: Miller. —Weiner recognizes that a return that lacks a valid signature is not

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the limitations period because §6501(a) plainly refers to the original return); *Atlantic Land & Improv. Co. v. United States*, 790 F.2d 853, 860 (11th Cir.1986) (FICA return filed by employer did not trigger statute of limitations on employer's RRTA tax liability because the FICA return did not include all the information necessary to compute the RRTA tax); *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1034 (6th Cir.1999) (return filed after IRS assessment not sufficient to defeat prohibition against discharge for taxes for which chapter 7 debtor did not file a return); *In re Hatton*, 220 F.3d 1057, 1061 (9th Cir.2000) (substitute return by IRS and installment agreement by debtor failed to qualify as a return under Beard, thus debtor's tax liability was not dischargeable in bankruptcy); *Heim v. Commissioner*, 251 F.2d 44, 45 (8th Cir.1958) (there can be a valid joint return even if one spouse failed to sign return); *Sharwell v. Commissioner*, 419 F.2d 1057, 1059 (6th Cir.1969) (signature of wife is only one factor is determining whether a return is joint); *Sente Invest. Club Partnership v. Commissioner*, 55 T.C.M. (CCH) 1565, 1567, 1988 WL 83532 (1988) (court held designated "managing partner" who signed return was not legally partner entitled to file petition to challenge FPAA; validity of return was not at issue.); *Appeal of Mabel Elevator Co.*, 2 B.T.A. 517, 519 (1925) (return based on fiscal instead of calendar year was sufficient to start limitations period).

Weiner also has cited two cases of dubious precedential value. The holding in *Colmer-Green Lumber Co. v. Commissioner*, 12 B.T.A. 256, 263 (1928) that the return at issue was sufficient to trigger the statute of limitations was reversed by *Lucas v. Colmer-Green Lumber Co.*, 49 F.2d 234, 235 (5th Cir.1931). Weiner also cites *Indiana Rolling Mills Co. v. Commissioner*, 13 B.T.A. 1141, 1144 (1928), which holds that the statute providing that a corporate return "shall" be sworn to by certain officers is not mandatory. *Indiana Rolling Mills* is directly contrary to the later decision in *Burford Oil Co. v. Commissioner*, 153 F.2d 745, 746 (5th Cir.1946), cited by the IRS, which holds that the requirement that a return shall be sworn to by certain corporate officers is set forth in the IRC in mandatory language and failure to comply therewith condemns the return. Thus, Weiner's reliance on these authorities is unavailing.

a return under §6063. [32] Weiner contends that a faulty signature is not the same as no signature, *citing Miller v. Commissioner*, 237 F.2d 830, 836 (5th Cir.1956). In *Miller*, the Fifth Circuit upheld the validity of an individual taxpayer's return signed in that taxpayer's name by his wife, at his specific request, in the presence of, and at the place designated by, the accountant who prepared it. *Id.* The court of appeals rejected the proposition that the omission of the taxpayer's signature made the filing "no return at all." *Id.* At issue in *Miller* was the taxpayer's compliance with §51(a) of the 1939 IRC and certain Treasury Regulations regarding the verification of a return and signing of an individual return by an agent. *Id.* at 836-37. *Miller* does not support Weiner's position. The *Miller* court expressly distinguished *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 50 S.Ct. 297, 74 L.Ed. 829 (1930), because the corporate taxpayer in *Lucas* was required to comply with a statutory directive that returns were to be sworn to by specified corporate officers. An analogous distinction separates *Miller* from the instant case. The individual taxpayer in *Miller* was not a partnership governed by §6063. Section 6063 is expressly excepted from the statutory grant of authority to the Secretary to issue regulations governing the manner of signing returns. 26 U.S.C. §6061 ("Except as otherwise provided by ... 6063, any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary."). Thus, there is no statutory or regulatory authority allowing a partnership return to be signed by an agent. Moreover, the 1984 return was signed by "Joseph Voyer, Treasurer" without any indication that Voyer was

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[32] See Plaintiff's Response, at 19 (*citing Reaves v. Commissioner*, 295 F.2d 336, 338 (5th Cir.1961)).

signing on behalf of, with the permission of, or in the name of, any partner of TFA. The TFA return was not signed by a partner of TFA and thus did not contain a valid signature of the partnership.

Substantial Compliance.—Weiner further contends that the 1984 return was valid under the doctrine of substantial compliance because AMCOR, as managing agent for TFA, served, in effect, as TFA's general partner. Weiner bases his argument on *Commissioner v. Tower*, contending that "a partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses." 327 U.S. 280, 286, 66 S.Ct. 532, 90 L.Ed. 670 (1946). The Court is unpersuaded that this general rule assists the determination of the issues pertaining to the sophisticated public limited partnership involved in the case at bar. In *Tower*, the IRS challenged the existence of a husband-wife partnership. The Supreme Court stressed that transactions between a husband and wife designed to reduce family taxes should always be subjected to special scrutiny. *Id.* at 291, 66 S.Ct. 532; *see also Commissioner v. Culbertson*, 337 U.S. 733, 741, 69 S.Ct. 1210, 93 L.Ed. 1659 (1949) (considering the "family partnership problem"). The concerns that necessitated special scrutiny of a family partnership are not present for the TFA partnership. The IRS does not challenge the existence of TFA as a partnership.[33] The issue here is merely whether the 1984 return was signed by a "partner." Weiner provides no authority suggesting that the general principle set forth in *Tower* should be used to transform AMCOR, an entity explicitly designated as an agent of the

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[33] In fact, it is only Weiner, the partner and taxpayer, who challenges the validity of the partnership, after unsuccessfully seeking to benefit from his partner status.

partnership (or Voyer, AMCOR's Treasurer) into a "partner." TFA was formed through extensive and sophisticated documentation. AMCOR, the sponsor of TFA, established itself as a "managing agent," not a "partner." There is no basis to hold that Voyer is an implied partner of TFA.

Section 6063 contains the express requirement that a partnership return be signed by a partner. There is nothing in the statute that invites the loose construction Weiner advocates to permit a partnership return to be signed by the partnership's managing agent. The Court agrees with the analysis of the Tax Court in *Agri-Cal*, 80 T.C.M. (CCH) at 303. Weiner's various arguments invite uncertainty where Congress was clear and unambiguous. The tax laws are to be strictly construed. Weiner's contentions regarding substantial compliance with the partnership tax return signature requirement are rejected.

AMCOR as an Implicit Partner.—Weiner next argues that AMCOR was in fact a partner at the time the 1984 return was signed. Weiner supports this contention with the proposition that federal law, not state law, governs the determination of the identity of TFA's partners for tax purposes. *Baker v. Commissioner* , 74 T.C.M. (CCH) 744, 747, 1997 WL 595347 (1997); *Alhouse v. Commissioner*, 62 T.C.M. (CCH) 1678, 1680, 1991 WL 276050 (1991). In making this determination, Weiner requests that the Court determine the parties' subjective intent based on their objective acts, *citing Baker*, 74 T.C.M. (CCH) at 747, 1997 WL 595347, and weigh numerous factors in making its determination, *citing Alhouse*, 62 T.C.M. (CCH) at 1680, 1991 WL 276050. Under *Alhouse*, the relevant factors include, among others, the written agreement of the parties, the contributions of each party to the venture, control over partnership income and capital, sharing a proprietary interest in profits, and sharing an obligation for losses. *Id.* No single factor is determinative. *Id.*

The Court concludes that there is no legal basis for Weiner's approach of looking behind the parties' contract and contemporaneous writings to ascertain who are partners of TFA. Further, the Court is unpersuaded that Weiner's approach would provide the result he advocates. Both *Alhouse* and *Baker* are cases in which there was no partnership agreement. State law partnership formalities were not met. The taxpayers denied the existence of any partnership. These cases are therefore wholly inapposite. Here, in contrast, the TFA partnership was created in writing, and Weiner, for the purposes of this line of attack, does not dispute the partnership existence. Instead, Weiner asks the Court to deem an entity not designated as a partner in any partnership documents to be a partner for IRC purposes. This approach is rejected. As noted above, there is no legal justification for the Court to create a rule that requires scrutiny and weighing of complex, fact-intensive issues when the documents creating the partnership are crystal clear about each participant's status. Where AMCOR, the sponsor, intended to designate participants as "partners," it did so. By contract, AMCOR designed and adopted a non-partner role for itself. Weiner was apprised of his own, Voyer's, and AMCOR's respective roles. Weiner will not now be allowed to disclaim the legal effects of the partnership structure he endorsed by his investment in TFA and by his filing of tax returns claiming partner deductions.

In addition, AMCOR's conduct on its own and TFA's behalf clearly demonstrates that AMCOR was not a partner in TFA in 1984 or at the time the 1984 return was signed.[34] AMCOR is referred to as the "managing agent" in all partnership documents. AMCOR did not share in profits

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[34] The IRS has not articulated an alternative approach here. The Court conducts the analysis proposed by Weiner.

and losses; it was paid a fee for its management services.[35] There is no dispute that in December 1985, AMCOR purchased a partnership interest in TFA. The December 1985 letter agreement initiating this partnership interest is written in the present tense, indicating that AMCOR's agreement to buy, and the existing partners' agreement to sell partnership interests, was effective when the letter was executed.[36] Nothing about the letter indicates the parties intended to memorialize a past event or agreement. TFA did not file an amended Certificate of Limited Partnership identifying AMCOR as a partner until December 1985.[37] All of these actions and events establish that AMCOR was not in fact a partner in TFA on January 30, 1985 when Voyer signed the 1984 return as "Treasurer."[38]

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[35] AMCOR was paid an "incentive share" of profits after 1986 for its services, but the tax year in issue here is 1984.

[36] See Appendix to IRS's 1984 Cross-Motion, Exhibit 2.

[37] Weiner's sole evidence of AMCOR's status as an alleged partner in 1984, as opposed to the partnership's managing agent as designated in all the contemporaneous documents, is that TFA filed a partnership return signed by Voyer, and that AMCOR performed the functions of a general partner with management duties and authority. This self-serving contention is circular, without legal authority, and is rejected.

[38] Weiner further argues that even if he has not proven as a matter of law for his own summary judgment motion that AMCOR and Voyer were partners for the tax year 1984, the IRS has failed to meet its summary judgment burden on its cross-motion to prove that AMCOR and Voyer were not partners for 1984. The Court disagrees. Voyer signed the TFA 1984 return as "Treasurer," not partner. Weiner has provided no evidence or argument to suggest that there is a genuine fact issue concerning Voyer's non-partner status. In response to the IRS's 1984 Cross-Motion, Weiner points to alleged failures by the IRS to meet its discovery obligations. This argument fails. The facts relied upon by the Court in reaching its decision are undisputed matters of record. There is no basis for delaying a ruling on the Government's motion under Federal Rule of Civil Procedure 56(f) on the 1984 limitations issues. Weiner fails to

As a corollary, Weiner contends that federal law, and specifically §6063, does not mandate that a partnership return be signed by individuals deemed to be partners under state law. This argument is without substance. The Court has determined that, under Weiner's proposed federal law analysis, discussed elsewhere in this Opinion, neither Voyer nor AMCOR was a TFA partner at the time the TFA 1984 return was filed.[39]

Conclusion on Validity of the 1984 Return. —The Court concludes that the IRS has met its summary judgment burden to show that TFA's 1984 return was not signed by a partner as required by the IRC and thus did not trigger the statute of limitations for an assessment contained in 26 U.S.C. §6229(a). The IRS's 1984 Cross-Motion will be granted and Weiner's 1984 Motion will be denied.

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identify any potential discovery that is likely to reveal facts to create a genuine and material fact issue. Weiner relies on the argument that the IRS did not produce a complete 1984 partnership return with all attachments. Even if the evidence would show that TFA sent AMCOR and Voyer a 1984 Schedule K-1, there is no authority that such an act is significant as to AMCOR's or Voyer's partnership status in light of the substantial documentation that neither were partners in 1984 or when the 1984 return was signed.

[39] Weiner argues in his Reply that despite the express language of §6063, that section really does not require the signature of a partner at all. In support of this argument, Weiner points out that Treasury Regulations provide that a 1065 partnership return for a limited liability company may be signed by the general partner or any member. Any relevance Weiner's argument may have for limited liability companies under specific regulations governing those entities does not extend to the issue of the validity of a partnership return for a limited partnership such as TFA.

E. Weiner's 1985 Statute of Limitations Claim

Weiner was a limited partner in Emperor Seedless and Indio Date during the 1985 tax year. Emperor Seedless and Indio Date timely filed their 1985 partnership returns in January 1986. The three-year period within which the IRS was to issue an FPAA expired on April 15, 1989, unless there was a valid extension of the limitations period. The IRS did not issue the FPAAs for Emperor Seedless and Indio Date for the 1985 tax year until April 10, 1991. The IRS contends that the TMP for Emperor Seedless and Indio Date consented to extensions of the period for issuing an FPAA by executing valid Form 872-P Consents to Extend Time for Assessing Tax Attributable to Items of a Partnership ("Forms 872-P") by letter dated September 30, 1988 (the "September letter").

Weiner seeks summary judgment on his 1985 refund claim on the grounds that the Forms 872-P produced by the IRS are invalid because they are not signed by a validly designated TMP. Weiner contends that the September letter relied upon by the IRS, as well as similar letters dated June 16, 1988 and July 14, 1988 purporting to designate Schreiber the TMP for Indio Date and Emperor Seedless, does not comply with mandatory Treasury Regulations governing the method for designating a TMP.[40]

As with the TFA 1984 return, the IRS first asserts that the *Agri-Cal* decision collaterally stops Weiner from asserting a statute of limitations defense for the 1985 returns in issue. The IRS also contends on the merits of the pending

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[40] The IRS relies only on the September letter, not the prior June and July letters. Weiner apparently was not aware of the September letter until he received the IRS's 1985 Cross-Motion, and addressed only the prior letters in his original motion. In his Reply, Weiner asserts that the September letter was also invalid. Because the IRS is not relying on the attempted designations in June and July 1988, the Court will address only the September letter.

limitations issue a properly designated TMP for each partnership executed a valid Form 872-P and thereby extended to April 30, 1991, the time to issue the pertinent FPAAs.

1. Collateral Estoppel

The elements of collateral estoppel are set out in detail above in section III.D.1 and will not be repeated here. Like TFA, Emperor Seedless and Indio Date were not parties to the *Agri-Cal* case. Emperor Seedless and Indio Date did raise the statute of limitations issue in their respective Tax Court partnership cases. Also like TFA, the TMP of Emperor Seedless and Indio Date entered Stipulations with the IRS in December 1999, whereby he agreed that the "outcome of the statute of limitations issue present in this Partnership Case will be determined in a manner consistent with the Court's findings of fact and law on the statute of limitations issue present in the [*Agri-Cal* case]."

For the same reasons discussed as to the 1984 TFA return, the IRS has failed to establish that the issues here are identical in all respects to those in the *Agri-Cal* case. Because different partnerships are at issue here from those in *Agri-Cal*, the Court finds that *Sunnen* directs against application of collateral estoppel. See 333 U.S. at 599-600, 68 S.Ct. 715;*Hibernia*, 740 F.2d at 387. The Court therefore addresses the merits of the parties' summary judgment arguments on the timeliness of the FPAAs for Emperor Seedless and Indio Date for the 1985 tax year.

2. The Merits as to the 1985 Returns

Compliance With Treasury Regulations Through the September Letter.—The September letter designated Schreiber as the TMP for Indio Date and Emperor Seedless for tax year 1985. Weiner contends that the September letter does not comply with treasury regulations governing the exclusive method for designation of a tax matters

partner. Temporary Treasury Regulation §301.6231(a)(7)-1T(e)(1987), in effect at the time of the 1988 designation, provided:

> The partnership may designate a tax matters partner for a partnership taxable year at any time after the filing of a partnership return for that taxable year by filing a statement with the service center with which the partnership return was filed. The statement shall -
>
> (1) Identify the partnership and the designated partner by name, address, and taxpayer identification number;
>
> (2) Specify the partnership taxable year to which the designation relates;
>
> (3) Declare that it is a designation of a tax matters partner for the taxable year specified; and
>
> (4) Be signed by persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year....

Weiner attacks the September letter's designation of Schreiber as TMP for Emperor Seedless and Indio Date on the grounds that it does not list the address of the partnerships, and was not filed with the service center where the partnership returns were filed.[41]

The address listed on the September letter matches the address for the partnerships. Thus, the designation does, in

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[41] As discussed infra in the next subsection, Weiner also contends that the TMP designation and the Forms 872-P were signed at a time when Schreiber was acting under an unwaivable conflict of interest.

effect, identify the partnership by the correct address.[42] Weiner's contention on this point fails.

It is undisputed that the September letter was not filed with the IRS service center in Fresno, California, where the 1985 partnership returns were filed. Instead, Schreiber handed the letter to an IRS agent involved in the 1988 audit of AMCOR and its affiliated partnerships during a meeting at the offices of AMCOR.[43] Neither the IRS nor Schreiber should be faulted for Schreiber's following directions he received directly from an IRS agent directly involved in review of the partnership returns. Weiner has cited no authority invalidating a partnership's designation of its TMP under similar circumstances. The purpose of Treasury Regulation §301.6231(a)(7)-1T is to ensure that TMP designations are received by an IRS agent with authority over the returns in issue. Schreiber's handing the designation to Gaither, at her request, at AMCOR's offices fully satisfied this goal.[44]

Because the September letter was effective to designate Schreiber as TMP for tax year 1985, the Court will address whether the Forms 872-P executed by Schreiber for Indio

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[42] The letter also contained the correct partnership name and taxpayer identification number.

[43] See Affidavit of Debbie Gaither, Exhibit 4 to IRS's Supplemental Reply Brief.

[44] Although the Court declines to give it collateral estoppel effect, the *Agri-Cal* decision is well-reasoned on this point. The September letter at issue in this case is the same letter addressed in *Agri-Cal* in relation to the partnership Agri-Venture Fund. Affidavit of Debbie Gaither, Exhibit 4 to IRS's Supplemental Reply Brief. The *Agri-Cal* court found that the September designation substantially complied with the filing requirement of Treasury Regulation §301.6231(a)(7)-1T(e) when it was received in hand by Gaither, the IRS's agent. *Agri-Cal*, 80 T .C.M. (C.C.H.) at 305-06.

Date were effective to extend the time period for assessment of partnership taxes against Weiner for the 1985 tax year.

Schreiber's Conflict of Interest. —Weiner contends that there is need for further factual development before the Court rules on whether the FPAA statute of limitations expired prior to the assessments for the 1985 Emperor Seedless and Indio Date returns. Weiner primarily contends that the IRS's criminal investigation of Schreiber created a conflict of interest that disqualified Schreiber as TMP, thereby making the September designation letter and the Forms 872-P for these partnerships ineffective.[45] The IRS briefly addresses this point in its Supplemental Reply Brief, arguing that Weiner has no evidence to support his conflict of interest assertion because Behrens testified that the partners did not know about the criminal investigation at the time they signed the letters at issue.[46] Weiner contends that his decision to defer briefing on these matters is in accordance with the parties' agreement not to include this aspect of the issue in their pending motions for partial summary judgment. There is insufficient legal argument for the Court to ascertain if there is a genuine fact issue as to Schreiber's alleged conflict of interest as of September 1988. The Court cannot ascertain with any definiteness the date the criminal investigation commenced, the time Schreiber learned of the criminal or other IRS investigation, the reason Schreiber executed the Form 872-P, or the date the investigations of Schreiber ended. *See Phillips v. Commissioner*, 272 F.3d 1172, 1176 (9th Cir.2001) (criminal investigation does not necessarily disqualify TMP);

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45 It is unclear if Weiner contends that there are also other areas requiring factual development.

46 See Oral Deposition of Fred Behrens, Exhibit 5 IRS's Supplemental Reply Brief, at 88-89.

Transpac Drilling Venture 1982-12 v. Commissioner , 147 F.3d 221 (2nd Cir.1998). Therefore, the Court concludes that Weiner's 1985 Motion and the IRS's 1985 Cross-Motion will be denied without prejudice to reconsideration upon further legal and factual clarification.

F. Weiner's §6621 Interest Claim

Parties' Contentions. —Weiner has moved for summary judgment with respect to his claim for a refund of substantial interest for tax years 1984, 1985, and 1986 that the IRS has imposed pursuant to 26 U.S.C. §6621(c), which applies to "tax motivated" transactions. The IRS has also moved for summary judgment on this claim. The version of §6621(c) applicable in this case authorized the IRS to assess interest at 120% of the ordinary interest rate established by §6601 on any substantial underpayment attributable to a tax motivated transaction. [47] The definition of "tax motivated transaction" includes sham or fraudulent transactions. The IRS's assessment is presumed to be correct, and Weiner has the burden to prove otherwise. *Melton v. Teachers Ins. & Annuity Ass'n of America*, 114 F.3d 557, 560 (5th Cir.1997).

Weiner contends that he did not agree to pay this substantial interest as part of his settlement agreements, and he has not conceded any facts that support a determination that his underpayment of taxes was attributable to a tax motivated transaction. Moreover, Weiner contends that this Court lacks jurisdiction to make a determination that the underpayment was attributable to

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[47] The provision at issue was originally enacted as part of the Tax Reform Act of 1984 as §6621(d). It was amended by the Tax Reform Act of 1986 and redesignated as §6621(c). It was repealed in 1989 for returns due after December 31, 1989. The original purpose of §6621(d) was to encourage settlement of tax shelter cases. H.R. Rep. 98-861, at 985 (1984), 1984 U.S.C.C.A.N. 2140.

a tax motivated transaction because such a determination involves partnership items.

The IRS contends that the assessment of §6621(c) interest was part of Weiner's settlement agreements, or alternatively, the IRS contends that fact questions regarding the meaning of the settlement preclude summary judgment for Weiner.

Analysis of Parties' Settlement Agreement. —As stated above in the Court's discussion of the statute of limitations, the settlement agreement is governed by the general rules of contract law. *Alexander*, 44 F.3d at 331; *Treaty Pines Invest. Partnership*, 967 F.2d at 211. Thus, the intent of the parties must be gleaned from the four corners of their settlement documents. There is no mention of §6621(c) interest in the Form 870-P(AD) and accompanying Schedule of Adjustments for any of the years or partnerships at issue in this case. The IRS nevertheless argues that the Summary of the AMCOR Appeals Settlement Offer ("SAASO"), which expressly states that §6621(c) interest will be assessed as part of the settlement, is incorporated into and a part of the settlement agreement. The IRS contends that the SAASO was attached to the Form 870-P(AD) sent to Weiner. Weiner denies receiving the SAASO, but argues that even if he did receive it, the SAASO is not a part of the settlement agreement and cannot be used to alter, modify, or add to the terms of the settlement agreement contained in the Form 870-P(AD).[48]

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[48] The IRS submitted the Declaration of Jerry Gossett in support of its position that the SAASOs were included in the settlement packages. Exhibit 7 to United States' Supplemental Reply Brief. Weiner has objected to the Declaration on the grounds of hearsay, speculation, and opinion, and lack of foundation. Plaintiff's Objection to Declaration of Jerry Gossett [Doc. # 59]. Given the Court's determination that the SAASO's were not part of the settlement agreements, Plaintiff's Objection [Doc. # 59] is **overruled as moot**.

The IRS takes the positions that the settlement included, and Weiner agreed to, this interest as a result of the SAASO. These contentions are belied by the bold statement across the bottom of the SAASO that "THIS IS NOT PART OF THE APPEALS SETTLEMENT OFFER." The record demonstrates that Weiner was aware of the IRS's intent to assess §6621(c) interest. This awareness was evidenced by the statement in the cover letter from Weiner's CPA that accompanied his executed Forms 870- P(AD) that "we understand that the IRC §6621(c) interest penalty will be assessed." That awareness, however, does not constitute an agreement by Weiner not to contest the applicability of such interest. The settlement agreement, the Form 870-P(AD) and accompanying schedule of adjustments, as well as Weiner's ultimate payment of all the IRS claimed, are not concessions by Weiner that he agreed to the IRS's claim of entitlement to §6621(c) interest.

The Court concludes, nevertheless, that Weiner is not entitled to summary judgment on his claim for a refund of §6621(c) interest. Weiner's request for summary judgment goes too far. Weiner essentially argues that the settlement agreement binds the IRS, but not him. Weiner contends that §6621(c) interest was not part of the settlement agreement, but at the same time contends that §6621(c) interest is not owing as a matter of law because the IRS did not secure a concession that Weiner's underpayment was attributable to a tax motivated transaction in the settlement agreements. Weiner obliquely relies on *Todd v. Commissioner*, 862 F.2d 540 (5th Cir.1988), and *McCrary v. Commissioner*, 92 T.C. 827, 1989 WL 35568 (1989), in support of his position that the IRS cannot assess interest on a ground not expressly stated in the settlement agreement. Neither *Todd* nor *McCrary* prevent the IRS from seeking interest pursuant to §6621(c) in this case.

Todd involved interest assessed against a taxpayer pursuant to §6659,[49] which imposed an addition to tax in the case of an underpayment of taxes due to a valuation overstatement. In *Todd*, the Tax Court ultimately refused to allow the IRS's claim of §6659 interest, even though the Court upheld the IRS's disallowance of a depreciation deduction related to refrigerated food containers designed to preserve perishable food during shipment. 862 F.2d at 541. The deductions were disallowed because the food containers were never put into service, not because of the taxpayer's overvaluation of the containers. Tax Court held that the taxpayer's underpayment was not "attributable to" an overvaluation. Id. at 541-42. Because the IRS was only entitled to §6659 interest in the event the tax underpayment was due to an overvaluation, the Tax Court ruled that the taxpayers were entitled to a refund of interest. The Fifth Circuit affirmed the decision of the Tax Court. *Id.* at 542-45.

In *McCrary*, a taxpayer claimed deductions for losses related to rental payments on a master recording and an investment credit related to the fair market value of the master recording. *McCrary*, 92 T.C. at 839. Shortly before trial, the taxpayer conceded that the investment credit did not apply to the transaction at issue in order to avoid disallowance of the credit by the IRS on grounds that would constitute a tax-motivated transaction as specified in §6621(c). Id. at 851. The Tax Court nevertheless held that the taxpayers were not entitled to the deductions originally claimed, but that no part of the underpayment of the taxpayer's taxes was attributable to a valuation overstatement and that therefore the taxpayers were not liable for additions to tax under §6659. Id. at 855.

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[49] Section 6659 was repealed in 1989, at the same time §6621 was amended.

Weiner's case is distinguishable from both *Todd* and *McCrary*. In those two cases, the tax underpayments were found to be attributable to a circumstance other than overvaluation, the only factor that would support an addition to tax pursuant to §6659. In this case, the IRS contends that the underpayment is attributable to a sham transaction. The IRS's contention is not contrary to its settlement agreement or any findings by the Tax Court. Therefore, the settlement agreement does not preclude the IRS from seeking a ruling from this Court affirming its assessment of §6621(c) interest if supported by the facts.

Jurisdiction Over §6621(c) Issues.—Weiner argues that this Court lacks jurisdiction to determine whether Weiner's underpayments were attributable to tax motivated transactions. Weiner concedes that §6621(c) interest is an affected item, not a partnership item. [50] *NCF Energy Partners v. Commissioner*, 89 T.C. 741, 743, 1987 WL 45298 (1987). The determination of an affected item, such as §6621(c) interest, requires factual determinations that must be made individually at the partner level. *Id.* at 744. Indeed, the characterization of §6621(c) interest as a nonpartnership item forms a large part of Weiner's argument that such interest was not included in his settlement agreement, which by its express terms, settled only partnership items. Weiner nevertheless contends that the Court lacks jurisdiction to determine the applicability of §6621(c) interest based on a finding that the underlying transaction is a sham. The "sham transaction" determination under Weiner's analysis requires two distinct findings: (1) the taxpayer's lack of profit motive, and (2) the

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[50] The IRC defines an "affected item" as "any item to the extent such item is affected by a partnership item." 26 U.S.C. §6231(a)(5).

partnership's lack of economic substance. [51] While Weiner concedes that lack of profit motive is clearly a nonpartnership item, Weiner argues that lack of economic substance is a partnership item because it entails a determination of the bona fides of reported partnership income and/or loss, matters covered by subtitle A of the IRC.[52]

This argument is not persuasive. First, the Fifth Circuit has not yet adopted the view that both lack of profit motive and lack of economic substance are necessary to find a sham transaction. See *Compaq Computer Corp. v. Commissioner*, 277 F.3d 778, 781-82 (5th Cir.2001). Second, a determination that the transactions lack economic substance does not necessarily require re-opening partnership items. The IRS is not attempting to relitigate specific deductions or any other entry on the returns. The IRS is bound by the express terms of the settlement agreement. A review of Fifth Circuit authority addressing the assessment of §6621(c) interest indicates that the controlling factor in such a determination is the intent of the taxpayer. *See Durrett*, 71 F.3d at 517; *Chamberlain*, 66 F.3d at 732; Lukens, 945 F.2d at 99-100; *Heasley*, 902 F.2d at 386. Under Weiner's own theory, any determination

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[51] Weiner cites the Fifth Circuit cases *Durrett v. Commissioner*, 71 F.3d 515 (5th Cir.1996), *Chamberlain v. Commissioner*, 66 F.3d 729, 732 (5th Cir.1995), *Lukens v. Commissioner*, 945 F.2d 92, 99 (5th Cir.1991), and *Heasley v. Commissioner*, 902 F.2d 380, 383 (5th Cir.1990), in support of his approach. Although the cases discuss the characteristics of sham transactions, none held that the determination of whether a partnership was a sham transaction is a partnership item.

[52] Weiner cites *Randell v. United States*, 64 F.3d 101 (2nd Cir.1995), and *Hambrose Leasing v. Commissioner*, 99 T.C. 298, 1992 WL 210580 (1992), for this proposition. These cases held that District Courts lack jurisdiction to determine partnership income and liabilities. This general proposition is not dispositive of the Court's jurisdiction over §6621(c) issues which do not require reconsideration of such partnership items.

regarding §6621(c) interest is necessarily partner-specific because it requires, at a minimum, a finding that a specific partner lacked a profit motive. Thus, whether or not Weiner is entitled to a refund of interest assessed under §6621(c) is appropriate for litigation at the partner level.

The parties have presented no evidence on the merits of Weiner's lack of profit motive (or the economic substance of the partnership transactions). Thus, Weiner's §6621(c) refund claim cannot be resolved at this time and both his §6621 Motion and the IRS's §6621 Motion must be denied.

G. The IRS's §6404 Motion

The IRS contends that this Court lacks subject matter jurisdiction to determine Weiner's claim for abatement of interest under 26 U.S.C. §6404. The IRS may abate deficiency interest under certain circumstances. Id. Under the version of §6404 applicable to the tax years in issue in this case, interest could be abated if the deficiency resulted from errors or delays caused in whole or in part by IRS employees in the performance of ministerial tasks.[53]

Courts prior to 1996 consistently held that the Secretary's decision whether to abate interest under that statute was discretionary and beyond the review of the district courts.*See Argabright v. United States*, 35 F.3d 472,

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[53] Section 6404(e)(1), prior to 1996 amendments, read in relevant part:

(e) Assessments of interest attributable to errors and delays by Internal Revenue Service.–

(1) In general.–In the case of any assessment of interest on –

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, ...

the Secretary may abate the assessment of all of any part of such interest for any period.

476 (9th Cir.1994); *Selman v. United States*, 941 F.2d 1060, 1063-64 (10 th Cir.1991); *Horton Homes, Inc. v. United States*, 936 F.2d 548, 554 (11th Cir.1991). The plaintiffs in Argabright sought a refund of penalty interest for a period of delay in receiving proper settlement documentation from the IRS.[54] The Argabright court noted that although the Administrative Procedure Act ("APA") provides generally for judicial review of agency actions, §701 of the APA bars a court from exercising its jurisdiction if precluded by statute or if the agency action is committed to agency discretion by law. *Argabright*, 35 F.3d at 475; 5 U.S.C. §701(a). Relying on prior decisions of the Tenth and Eleventh Circuits, the *Argabright* court concluded "that §6404(e)(1) leaves courts without any basis for distinguishing between the instances in which abatement should and should not be granted. Lacking judicially manageable standards ... for judging how and when the agency should exercise its discretion, we hold that judicial review is not available for agency action taken pursuant to 26 U.S.C. §6404(e)(1)." *Id.* at 476 (internal citations omitted).[55]

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[54] In *Argabright*, the IRS settled in February, 1988, a Tax Court proceeding brought by certain investors in a tax shelter known as Wilpon. *Argabright*, 35 F.3d at 473. Despite direction from the Tax Court that the IRS should offer investors that did not participate in the 1988 proceeding the same settlement, the IRS did not provide settlement documentation to such investors until 1991, and then not on the same terms as the February 1988 settlement. Id. The Wilpon investors who settled in 1991 were the plaintiffs in *Argabright*.

[55] The *Argabright* Court also relied on *Horton Homes, Inc. v. United States*, 936 F.2d 548 (11 th Cir.1991). In *Horton Homes*, the Eleventh Circuit employed a similar analysis, citing legislative history expressing Congress's intent that the proposed provision "gives the IRS the authority to abate interest but does not mandate that it do so." 936 F.2d at 551; *see also Bax v. Commissioner*, 13 F.3d 54, 58 (2nd Cir.1993) ("[W]e note substantial authority for the view that interest abatement under §6404(e)(1) is a discretionary form of relief within the sole authority of

In *Selman*, the Tenth Circuit looked to the language, structure, and legislative history of the provision and determined that Congress intended to commit the abatement of interest to the agency's discretion. In denying review, the *Selman* Court stated "although the statute authorizes the Secretary to abate interest attributable to certain IRS errors or delays, it neither indicates that such authority should be used universally nor provides any basis for distinguishing between the instances in which abatement should and should not be granted." 941 F.2d at 1063. Moreover, the court noted that the "statute clearly speaks in permissive, not mandatory language." *Id.* at 1064.[56]

Recognizing these authorities, Weiner argues that a waiver of sovereign immunity was enacted by Congress in 1996, when §6404(e)(1) was amended by the Taxpayer Bill of Rights 2 ("TBOR2"), to provide in relevant part:

> In the case of any assessment of interest on–
>
> > (A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial or managerial act
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> * * * * * *

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the Commissioner and is thereby beyond the scope of judicial review.").

[56] The *Argabright* court also agreed with the reasoning in *Selman* that §6404(e)(1) provided only that the agency "may abate" increases in interest assessments due to delays caused by IRS personnel, whereas a closely related provision, §6404(e)(2), dealing with erroneous refunds, provided that "[t]he Secretary shall abate the assessment of interest," and thus Congress revealed its intent to make §6404(e)(1) abatements discretionary rather than mandatory. 35 F.3d at 475.

> the Secretary may abate the assessment of all or any part of such interest for any period.

(emphasis added).[57] The amendment added the italicized words "unreasonable" to modify "error or delay" and expanded coverage to IRS "managerial" (in addition to ministerial) acts. See TBOR2, Pub.L. No. 104- 168, §301, 110 Stat. 1452 (1996). Weiner also relies on §6404(i)(1), added by Congress at the same time:

> The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

26 U.S.C. §6404(i)(1). This amendment applies to requests for abatement submitted to the IRS after July 30, 1996, regardless of the tax year to which the abatement request pertains. See TBOR2, Pub.L. No. 104-168, §302(b), 110 Stat. 1452 (1996).

Weiner contends that these amendments to §6404 abrogate the *Argabright* line of cases, make abatement decisions reviewable by the District Court in a refund action, do not evidence Congressional intent to give the Tax Court exclusive jurisdiction over §6404 matters, and provide the "abuse of discretion" standard of review for District Courts' review of these IRS decisions. The IRS responds that the waiver of sovereign immunity in the 1996 amendment to §6404 was expressly limited to the Tax

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[57] These amendments became effective for tax years after the date of enactment, *i.e.*, 1996. See TBOR2, Pub.L. No. 104-168, §301(c), 110 Stat. 1452 (1996).

Court, and contends that the Argabright rule still governs to preclude District Court review. [58] The Court concludes that the IRS has the better side of this jurisdictional argument.

The United States, as sovereign, is immune from suit unless it waives that immunity. *United States v. Dalm*, 494 U.S. 596, 609, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990); *see also United States v. Mottaz*, 476 U.S. 834, 841, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction."); *PALA, Inc. Employees Profit Sharing Plan and Trust Agreement v. United States* , 234 F.3d 873, 876 n. 7 (5th Cir.2000); *Webb v. United States*, 66 F.3d 691, 693 (4th Cir.1995). Jurisdiction is conferred on district courts by 28 U.S.C. §1346 to handle actions to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws," including interest. 28 U.S.C. §1346; *see Horton Homes, Inc.*, 936 F.2d at 550. The general jurisdictional grant in §1346(a)(1) must be read to incorporate other statutory requirements*Dalm*, 494 U.S. at 601-02, 110 S.Ct. 1361; *see also United States v. Forma* , 42 F.3d 759, 763 (2nd Cir.1994) ("statutory provisions and court interpretations have placed a number of conditions on the explicit waiver of sovereign immunity instituted through 28 U.S.C. §1346(a)(1)").[59] Waivers of

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[58] The Court does not reach the IRS's other non-jurisdictional arguments.

[59] For instance, §7422(a) provides that no suit for a tax refund may be maintained unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." *Forma*, 42 F.3d at 763 n. 7. Section 6511, in turn, constitutes one of these "provisions of law" governing refund claims that must be complied with in order to find that the conditions of Congress's broad consent to suit

sovereign immunity should be "construed strictly in favor of the sovereign, and not enlarge[d] ... beyond what the [statutory] language requires." *See Webb v. United States*, 66 F.3d 691, 693 (4th Cir.1995) (*quoting Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) (addressing the statute of limitations in tax refund suits) (citations and internal quotations omitted); *see also Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) ("although we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended'" (*quoting United States v. Kubrick*, 444 U.S. 111, 117-18, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979))); *United States v. Neary* (*In re Armstrong*), 206 F.3d 465, 473 (5th Cir.2000) (*citing Frederick v. United States*, 386 F.2d 481, 488 (5th Cir.1967) (finding waiver of sovereign immunity as to counterclaims where the government has instituted an action, but not extending to relief exceeding in amount or different in kind to that claimed by the government)).

Weiner focuses his first argument on Congress's addition of the word "reasonable" to §6404 to describe the type of IRS error or delay that is reviewable. Weiner contends that the word "reasonable" implies a standard by which the Court can review the Secretary's decision, thus addressing appellate courts' concerns under the APA that §6404 contained no standard by which to measure the IRS's exercise of discretion. This argument lacks merit. Substantively, the addition of the word "reasonable" is, at best, a general indication of the types of error or delays that a taxpayer may challenge, not a reference to the standard of the courts' review. However, even more significantly, this amendment applies only to interest accrued with respect to deficiencies or payments for taxable years beginning after

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contained in §1346(a)(1) are met. *Id.* at 763 n. 8.

July 30, 1996. TBOR2, Pub.L. 104-168, §301(c)(1996); see Historical and Statutory Notes to 26 U.S.C. §6404. Thus, the new reasonableness standard does not apply to the IRS's abatement decision in this case, which involves the tax years 1984-86, and cannot serve as a basis for District Court jurisdiction under §6404.[60]

Weiner next argues that any finding that the Tax Court has exclusive jurisdiction to review abatement decisions ignores the well-established Internal Revenue Code scheme providing the Tax Court with jurisdiction for taxpayers' pre-payment claims and District Court jurisdiction for post-payment (i.e., refund) claims. Weiner's argument ignores Congress's expressed intention in amending the statute. The legislative history of §6404(i) includes a committee report providing:

> *Present Law*
>
> Federal courts generally do not have jurisdiction to review the IRS's failure to abate interest.
>
> *Reasons for change*
>
> The Committee believes it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers.
>
> *Explanation of Provision*
>
> The bill grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer was an abuse of discretion. The Tax Court may order an abatement of interest. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest. An eligible

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60 Moreover, the amendments did not alter the permissive language of the statute granting the IRS discretion as to when to waive interest.

> taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees. No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest.

H.R. REP. No.104-506, at 28 (1996), 1996 U.S.C.C.A.N. 1143, 1151. Weiner argues that Congressional refusal to express an opinion as to whether the prior statute was subject to judicial review indicates an intention to abrogate the Argabright line of cases. Weiner posits that if Congress believed judicial review was precluded under the prior statute, it would have said so expressly. Weiner seems to ignore Congress's comment in its summary of "Present Law" in the House Report that "[f]ederal courts generally do not have jurisdiction to review the IRS's failure to abate interest." Weiner also ignores the "Reasons for change" in which the Committee referred solely to the Tax Court in its explanation of the grant of jurisdiction. Further, Congress, by its statutory language in §6404(i)(1), expressly granted the Tax Court jurisdiction to review such decisions. Nothing in the amended §6404 or its legislative history indicates Congressional intent to allow District Courts to review abatement decisions, under the abuse of discretion or any other standard.[61] The Court concludes that Congress did not intend sub silentio to alter longstanding precedent on District Court jurisdiction.[62]

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[61] Aware of the need to set standards for the Tax Court in its review of the Secretary's discretionary decision, Congress also incorporated in that section an "abuse of discretion" standard. Congress thus clearly expressed its intent that IRS determinations regarding interest that results from IRS ministerial errors or delays are no longer committed to absolute agency discretion, as under pre-TBOR2 law.

[62] Weiner's last ditch effort is a contention that the House Report's concluding comment that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate

Although no courts of appeals have wrestled with the 1996 amendments to §6404 with respect to the authority of the District Courts, every District Court that has addressed the issue has declined to review abatement decisions. *See Davies v. United States* , 124 F.Supp.2d 717, 721 (D.Me.2000) ("While it is true that Congress, in enacting section 6404(i), made abatement decisions reviewable by the Tax Court pursuant to an abuse-of-discretion standard, there is no indication that Congress intended that this standard be exported to the district courts. If anything, the legislative history indicates the opposite: that Congress believed and intended that the Argabright line of cases would be untouched."); *Henderson v. United States* , 95 F.Supp.2d 995, 1004 (E.D.Wis.2000) (district court lacked jurisdiction because Section 6404(i) grants jurisdiction specifically to the Tax Court); *Beall v. United States*, 170 F.Supp.2d 709, 712 (E.D.Tex.2001) ("6404(i)'s sole reference to the "Tax Court" leads to the inevitable conclusion that Congress expected that the federal district courts would continue to follow the Argabright line of cases, and, therefore, would not undertake judicial review of IRS interest abatement decisions.").

The Court concludes that the 1996 amendments to §6404 do not authorize District Courts' review of §6404 abatement decisions. There is no reason Congress would do through the web of inferences and exported standards proposed by Weiner what Congress easily could have done expressly. Thus, the IRS's decision not to abate interest pursuant to §6404(e)(1) is beyond the jurisdiction of this Court, and the IRS's §6404 Motion will be granted. Weiner's claims for abatement of interest pursuant to 26 U.S.C.

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interest" means that Congress believed that judicial review was not previously barred. The Court does not agree. The quoted sentence does not imply one way or another what Congress thought the scope of a District Court's jurisdiction was.

§6404 for the tax years 1984, 1985, and 1986 must be dismissed with prejudice.

IV. CONCLUSION

For the reasons set forth above, the Court concludes that it has jurisdiction to address Weiner's statute of limitations contentions, but lacks jurisdiction over his challenge to the IRS's denial of abatement of interest under §6404. The Court concludes that collateral estoppel does not preclude Weiner's litigation of the timeliness of the FPAAs on the TFA partnership return for tax year 1984 and the Emperor Seedless and Indio Date returns for tax year 1985.

The Court further concludes, on the merits of the parties' limitations arguments, that the assessment against Weiner for the TFA partnership for tax year 1984 is not time-barred. The TFA 1984 tax return was not signed by a partner as required by §6063. Thus, the filing of that return did not commence the three year limitations period for issuance of the FPAA.

The Court also concludes that the record is insufficient to determine if summary judgment is warranted for either party on the limitations issues regarding the Emperor Seedless and Indio Date 1985 returns. The parties are invited to submit more detailed legal and factual arguments, if appropriate on this issue, as indicated in this Opinion.

Finally, the Court concludes that summary judgment is not appropriate for either party on the issue of whether Weiner's investment in the TFA partnership was a sham transaction and whether penalty interest should apply under §6621(c). It is therefore,

ORDERED that Weiner's Motion for Partial Summary Judgment Based on Statute of Limitations for 1984 [Doc. # 21] is DENIED. It is further

ORDERED that the United States' Cross-Motion for Partial Summary Judgment Based on Statute of Limitations for 1984 [Doc. # 27] is GRANTED. It is further

ORDERED that Weiner's claim for a tax refund for the 1984 tax year on the grounds that the IRS's FPAA for that year was untimely is DISMISSED with prejudice. It is further

ORDERED that Weiner's Motion for Partial Summary Judgment Regarding 1985 Statute of Limitations Claim [Doc. # 19] is DENIED. It is further

ORDERED that the United States' Cross-Motion Regarding 1985 Statute of Limitations Claim [Doc. # 29] is DENIED. It is further

ORDERED that Weiner's Motion for Partial Summary Judgment with Respect to his §6621(c) Related Claims [Doc. # 22] is DENIED. It is further

ORDERED that the United States' Motion for Partial Summary Judgment Based on Settlement Agreement [Doc. # 48] is DENIED.

ORDERED that the United States' Motion for Partial Dismissal of Plaintiff's Complaint [Doc. # 16] is GRANTED. It is further

ORDERED that Weiner's claim for abatement of interest pursuant to 26 U.S.C. §6404 is DISMISSED with prejudice.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Morris A. WEINER,	§	
	§	
Plaintiff,	§	
v.	§	No. CIV.A.00-1297.
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

MEMORANDUM ORDER

ATLAS, District Judge.

This tax case raises novel issues relating to limited partners' tax obligations and the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"). The case is again before the Court on Plaintiff Morris Weiner's Motion for Reconsideration of Summary Judgment [Doc. # 65] and Weiner's Supplement to Motion for Reconsideration of Summary Judgment [Doc. # 71], to which the United States has responded [Docs. # 68, 74, respectively]. Also before the Court is the United States' Motion to Reconsider Memorandum Opinion, and Brief in Support [Doc. # 73]. Weiner has filed a Response [Doc. # 77], and the United States has replied [Doc. # 78].

Both parties seek reconsideration of certain rulings contained in this Court's Memorandum Opinion issued March 31, 2002 and entered April 2, 2002 ("Memorandum Opinion") [Doc. # 63].[1]

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[1] On this day, the Court is issuing an Amended Memorandum Opinion to correct typographical errors contained in the March 31, 2002 Memorandum Opinion, and to incorporate the corrections contained in the Court's April 8, 2002 Order Denying IRS's §6621 Motion [Doc. # 64].

Having considered the parties' briefs, all matters of record, and applicable legal authorities, the Court concludes that Weiner's Motion For Reconsideration, as Supplemented, and the United States' Motion for Reconsideration should be **denied**.

I. INTRODUCTION

In his original Motion for Reconsideration, Weiner asked the Court to reconsider its ruling that the 1984 tax return of the partnership Travertine Flame Associates ("TFA") was not signed by a partner because AMCOR had power of attorney to sign the return and because discovery was necessary to determine whether AMCOR or Joseph Voyer were partners in TFA at the time Voyer signed the 1984 tax return. Weiner previously raised these issues in his summary judgment motion and in response to the Government's summary judgment motion. Weiner incorrectly asserts that the Court did not consider these arguments. The Court in fact considered and rejected them, as discussed below.[2]

At a conference on May 17, 2002, the Court agreed to withhold ruling on Weiner's Motion for Reconsideration pending production by the United States of the 1984 and

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The Amended Memorandum Opinion contains no substantive changes to the March 31, 2002 Memorandum Opinion, and thus no further motions for reconsideration may be filed by the parties. The page numbering of the Amended Memorandum Opinion is substantially the same as the original. Therefore, citations herein will be to the Amended Memorandum Opinion.

[2] Weiner has presented no new law or evidence to support his power of attorney argument, and the Court stands by its ruling that there is no authority for allowing a partnership return to be signed by an agent. *See* Amended Memorandum Opinion, 255 F.Supp.2d 624, 648-49.

1985 Schedule K-Is for the general partners of TFA. [3] At that conference, the Court further permitted both parties to file additional Motions for Reconsideration. Thereafter, Weiner filed his Supplement to Motion for Reconsideration, and the United States filed its Motion for Reconsideration. The United States' Motion asks the Court to revisit its ruling that collateral estoppel does not apply to the issue of whether the 1984 TFA tax return was signed by a partner, and its ruling that Weiner did not agree in settlement to pay §6621(c) interest.

Neither party has sought reconsideration of the Court's ruling that it has jurisdiction to determine the statute of limitations issue. In a parallel proceeding, *Kraemer v. United States,* Civil Action No. H-00-2948, in which the taxpayers made a refund claim based on the same statute of limitations arguments Weiner raises here, Magistrate Judge Nancy Johnson dismissed the taxpayers' limitations claims on the ground that the district court lacks subject matter jurisdiction. It is undisputed that a district court has subject matter jurisdiction over refund actions to the extent that the claimed refund is attributable to "nonpartnership" items. 26 U.S.C. §7422(h). Magistrate Judge Johnson ruled that the statute of limitations for issuance of a Final Partnership Administrative Adjustment ("FPAA") must be determined at the partnership level. On reconsideration, Magistrate Judge Johnson explained that the statute of limitations defense is a procedural challenge to the "partnership item" of the IRS's proposed adjustments

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[3] The Court notes that while the parties may have agreed not to conduct discovery until after rulings on summary judgment motions, the Court never ordered a stay of discovery. In addition, Weiner never moved to compel the Government to turn over the information he now contends is crucial to the determination of issues presented in the Government's summary judgment motion. Weiner did move for a protective order to limit discovery on "partnership items" [Doc. # 30], but the Court denied the motion orally on the record at a hearing on October 24, 2001.

to the partnership return called for by the FPAA. Thus, although the statute of limitations is found in subtitle F of the Internal Revenue Code, plaintiff sought a refund based on adjustments called for by the FPAA. Thus, Magistrate Judge Johnson concluded that the taxpayers' limitations claim was an action was for a refund attributable to a partnership item and was outside the district court's jurisdiction. *See* Order dated June 7, 2002 [Doc. # 49 in Civil Action No. H-00-2948]. The Court recognizes the jurisdictional issue is a threshold one. Magistrate Judge Johnson's opinion is well-reasoned, although unprecedented in its approach. Neither party in the case at bar has asserted the arguments Magistrate Judge Johnson adopted in *Kraemer,* and neither has sought reconsideration of the this Court's ruling that jurisdiction exists over the limitations-based refund claim. Because Magistrate Judge Johnson's approach relies on analysis of TEFRA and the Internal Revenue Code not yet squarely adopted by any appellate court, because the Fifth Circuit's TEFRA precedent does not address the issue, because this case raises numerous legal questions about tax obligations at least 16 years old, and because resolution of these issues affects many related pending and potential cases, the Court will not revisit its jurisdictional ruling. The Court accordingly exercises jurisdiction over the statute of limitations issue based on the analysis in its Amended Memorandum Opinion, at 632-39.

II. ANALYSIS OF WEINER'S MOTION

This Court held in its Memorandum Opinion that the IRS's assessment for the 1984 tax year was not time-barred because the time period for issuance of an FPAA did not begin to run upon the filing of the TFA 1984 tax return because that return had not been signed by a partner as

required by Internal Revenue Code §6063. [4] *See* Amended Memorandum Opinion, at 645-52.

In his original Motion for Reconsideration, Weiner cited Fred Behrens's testimony that "in many cases" AMCOR acquired partnership interests within the year after the partnership was formed. However, Behrens offered no testimony as to when AMCOR actually acquired a partnership interest in TFA. Nor did he identify any specific documents that would answer the question. Behrens testimony offers no assistance in determining when AMCOR became a TFA partner.

In his Supplement, Weiner relies on the recently produced 1984 and 1985 Schedule K-1s for TFA general partners Behrens, Wright, and Schreiber, and the 1985 Schedule K-1 for AMCOR. The 1985 Schedule K-1 for AMCOR[5] reports that AMCOR's partnership percentage was .500000% ***both*** "before decrease or termination" (Column D(i)), and at the end of the year (Column D(ii)). On the 1984 Schedule K-1s for general partners Behrens, Wright, and Schreiber,[6] Column D(i) is blank, and Column D(ii) specifies that each had a partnership interest at the end of the year of .333300%. The 1985 Schedule K-1s for Behrens, Wright, and Schreiber,[7] reflect in that each had a .166600% interest "before decrease or termination" (Column D(i)) and that each had a .166600% interest at the end of

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4 The statutory framework under TEFRA requires notification by the IRS to individual partners of any adjustments to partnership items reported in the partnership return. *See* Amended Memorandum Opinion, at 630-32.

5 Exhibit A to Weiner's Supplement.

6 Exhibits B-D to Weiner's Supplement.

7 Exhibits E-G to Weiner's Supplement.

the year (Column D(ii)). Weiner argues that the combination of these documents indicates that AMCOR was a partner at all times during 1985. The Court finds Weiner's argument unpersuasive.

It is undisputed that AMCOR was not a partner in 1984. Therefore, it is evident that AMCOR became a partner in 1985. Weiner contends that the entry in the AMCOR 1985 Schedule K-1 in Column D(i), showing AMCOR's partnership percentage at .500000%, proves that it was a partner as of January 1, 1985. The Court disagrees. This entry does not comport with the 1985 Instructions for Schedule K-1 (Form 1065).[8] Column D(i) does not ask for the partnership percentage at the beginning of the year; it asks for the partnership percentage ***prior to any decrease or termination*** during the year. Under Weiner's theory, Column D(i) should have been zero or left blank, as it was in the 1984 Schedule K-1s for Behrens, Wright, and Schreiber. The listing of a partnership percentage for AMCOR in Column D(i) of its 1985 Schedule K-1 is not evidence that AMCOR was a TFA partner on January 1, 1985.[9] *See Ehrensperger v. Commissioner,* 67 T.C.M. (CCH) 3106, 3108 (1994) (finding Schedule K-1s insufficient to meet taxpayers burden to establish his share of liabilities in partnerships).

Weiner next argues that his position that AMCOR became a partner as of January 1, 1985, is supported by the

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[8] *See* Exhibit 2 to United States' Response, at 10.

[9] The unreliability of the K-1s is further illustrated by the 1985 Schedule K-1s of Behrens, Wright, and Schreiber. Even under Weiner's theory, those Schedules should have listed .333300% in Column D(i) and . 166600% in Column D(ii) to indicate the change in their partnership percentages. To adopt Weiner's conclusion, the Court would have to place total reliance on the Schedules K-1s *and* conclude that a change effective as of January 1, 1985 did not take place ***during*** 1985.

items of income reported on the Schedule K-1s. Each general partner reported income on his individual Schedule K-1 in accordance with his partnership percentage. The income allocation in these Schedules is not *pro-rated,* however, to reflect that AMCOR did not obtain its partnership interest until December 1985. Because TFA was prohibited by the Internal Revenue Code from retroactively allocating income or loss to AMCOR, Weiner argues, AMCOR must have purchased its interest on January 1, 1985. [10] The Court finds that the AMCOR Schedule K-1 may be some evidence as to how, long after the fact, the general partners decided to allocate partners' income, but is not proof of the legal accuracy of that *post hoc* allocation.[11]

Finally, Weiner extrapolates that because AMCOR was the general partner with the largest profit percentage interest at the close of the 1985 taxable year, it was the 1985 tax matters partner for TFA. Even if that is true as to the 1985 taxable year, it is not true as to the 1984 taxable year at issue. AMCOR's status as of the end of 1985 does not answer the question as to whether AMCOR was authorized to sign the 1984 tax return in January 1985.

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[10] *See Ogden v. Commissioner,* 788 F.2d 252 (5th Cir.1986); *Katz v. Commissioner,* 116 T.C. 5, 2001 WL 30538 (2001); *Johnsen v. Commissioner,* 84 T.C. 344, 1985 WL 15302 (1985).

[11] The partnership's tax records are evidence of what was actually reported to the IRS. However, the Court does not consider them meaningful evidence on the ultimate question of whether, and when, the legal prerequisites for partnership of AMCOR were met. Weiner contends that the United States acknowledged the 1985 allocations were proper by agreeing in the Tax Court case that there should be no change in TFA's partnership items for 1985. The Court is unpersuaded. The fact that the IRS did not contest the allocation in the Tax Court case is not the equivalent of an admission as to the date AMCOR became a partner in TFA.

Reliance on AMCOR's Schedule K-1 for 1985, which was prepared some time in 1986 long after the events and calendar years at issue, ignores the parties' partnership documentation, as well as the parties' December 5, 1985 letter agreement, and the amended Certificate of Limited Partnership filed in December 1985. Weiner had complete access to the general partners of TFA during discovery in this case and should have known that the status of AMCOR as a partner in TFA would be an important issue in his case. Yet, he has presented no evidence that establishes that AMCOR became a partner of TFA on January 1, 1985. The assumptions and reasoning Weiner suggests regarding the Schedule K-1s and AMCOR's partnership status, even if amounting to a scintilla of evidence, simply are too attenuated to support a verdict in his favor. Weiner has failed to establish a genuine fact issue that AMCOR was partner in TFA on January 30, 1985, the date Voyer signed the 1984 tax return, in light of the substantial evidence supporting the Court's conclusion that AMCOR became a partner in December, 1985. *See* Amended Memorandum Opinion, at 632-33, 649-51. Weiner has presented no probative evidence or argument in his Motion for Reconsideration or Supplement to Motion for Reconsideration that warrants any change in that decision.

III. ANALYSIS OF UNITED STATES' MOTION

In its Memorandum Opinion, this Court declined to apply collateral estoppel to bar Weiner from litigating whether the FPAAs for TFA for tax years 1984 and 1985 were time-barred because the issues in the Tax Court and the current case are not identical in all respects. Amended Memorandum Opinion, at 640-45. This Court further held that Weiner did not agree to pay §6621(c) interest in his settlement agreement. *Id.* at 654-56. In its Motion to Reconsider, the United States first argues that the Court erred in relying on the restrictive approach of *Commisioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 68 S.Ct. 715,

92 L.Ed. 898 (1948), in declining to apply collateral estoppel in this case. Second, the United States argues that the Court mistakenly concluded that the Summary of the AMCOR Appeals Settlement Offer ("SAASO") was not part of the settlement, and thus erred in denying summary judgment on the United States' claim for §6621(c) interest.

A. *Sunnen* is Still Binding Precedent for This Court

The United States argues that the collateral estoppel doctrine expressed in *Sunnen* has been supplanted by *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), in which the Supreme Court determined that *Sunnen* 's "doctrine of separable facts" did not bar collateral estoppel where the factual differences in issue were "too inconsequential to warrant relitigation" and were not capable of "altering facts essential to the judgment." *Montana,* 440 U.S. at 160-61, 99 S.Ct. 970.

The Court first notes that the United States did not raise this issue in its summary judgment briefing. To the contrary, the United States represented to the Court that *Sunnen* governed the collateral estoppel analysis:

> Indeed, plaintiff is correct when asserting that collateral estoppel is narrowly applied in tax cases. The limitation was set out by the Supreme Court in *Commissioner v. Sunnen:* '[Collateral estoppel] must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.'

Reply on United States' Cross-Motion for Partial Summary Judgment Based on Statute of Limitations for 1985 [Doc. #

47],[12] [FN12] at 2 (citing *Sunnen,* 333 U.S. at 599-600, 68 S.Ct. 715). Moreover, the United States did not cite *Montana* at all in support of its collateral estoppel argument. Obviously, *Montana* is not new law of which the United States could only have become aware since filing its summary judgment briefing. Therefore, the United States waived its argument that *Sunnen* does not apply. Nevertheless, the Court has considered the United States' position and finds it unpersuasive on the merits.

The United States' argument overlooks a critical distinction between *Sunnen* and *Montana* and its progeny: *Montana* is not a traditional tax case. In *Montana,* a contractor on a public works project brought suit in Montana state court challenging the constitutionality of a Montana state gross receipts tax imposed upon contractors of public, but not private, construction projects. *Montana,* 440 U.S. at 150-51, 99 S.Ct. 970. The litigation was directed and financed by the United States. *Id.* at 151, 99 S.Ct. 970. While the state case was pending, the United States initiated a challenge to the same statute in the United States District Court for the District of Montana. *Id.* By agreement, the federal case was stayed pending resolution of the state-court litigation. *Id.* The Montana Supreme Court found the tax constitutional. *Id.* The contractor then filed a second state-court case seeking a tax refund. The Montana Supreme Court ruled that the contractor's second state court suit was in all material respects identical to his first state court action, and dismissed the second case. *Id.* After the second Montana Supreme Court decision, the United States District Court heard the United States' case and, finding it was not bound by the Montana Supreme

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[12] Because the arguments the United States wished to present were identical, the Reply as to the 1985 statute of limitations issue was incorporated into the Reply on United States' Cross-Motion for Partial Summary Judgment Based on Statute of Limitations for 1984 [Doc. # 46].

Court decision, struck down the tax as violative of the Supremacy Clause. *Id.* at 152, 99 S.Ct. 970. On appeal by the State of Montana, the United States Supreme Court found "that the constitutional question presented by this appeal was determined adversely to the United States in a prior state proceeding" and reversed the district court's ruling on grounds of collateral estoppel without reaching the merits. *Id.* at 152-53, 99 S.Ct. 970. The Supreme Court stated "[a] review of the record in [the first Montana case] dispels any doubt that the plaintiff there raised and the Montana Supreme Court there decided ***the precise constitutional claim*** that the United States advances here." *Id.* at 156, 99 S.Ct. 970 (emphasis added). In fact, the United States' amended complaint tracked almost verbatim the language of the plaintiff's complaint in the state court action. *Id.*

The United States argued, citing *Sunnen,* that collateral estoppel applies only when "the controlling facts and applicable legal rules remain unchanged." *Id.* at 158, 99 S.Ct. 970. The United States also asserted that the facts in the federal case varied from the prior state court case because an allegedly critical provision contained in the construction contract at issue in the state court case was not present in the contract at issue in the federal litigation. *Id.* at 158, 99 S.Ct. 970. The Supreme Court agreed with the United States "that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues," but concluded that the Montana Supreme Court's decision was not predicated on the facts that distinguished the federal and state cases. *Id.* at 159. In other words, the distinct contract provision cited by the United States was irrelevant to the Montana Court's decision. Having found no material difference in the controlling facts, the Supreme Court held that "unless there have been major changes in the law governing intergovernmental tax immunity since [the first

Montana suit], the Government's reliance on [*Sunnen*] is misplaced." *Id.* at 161, 99 S.Ct. 970. The Court went on to say that underlying the *Sunnen* decision was a concern, absent from the instant case before it, that modifications in controlling legal principles could render a previous determination inconsistent with prevailing doctrine and result in "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion." *Id.* at 161, 99 S.Ct. 970 (citing *Sunnen,* 333 U.S. at 599, 68 S.Ct. 715). A close reading of *Montana* thus reveals that the United States' contention that *Montana* overruled *Sunnen's* "separable facts" doctrine vastly overstates the scope of the *Montana* ruling.

Since deciding *Montana,* the Supreme Court held that *Sunnen* is "pertinent and indeed is controlling" precedent in a tax case. *Limbach v. Hooven & Allison Co.,* 466 U.S. 353, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984) (refusing to apply collateral estoppel in a case involving different tax years, noting "the reason for not applying the collateral-estoppel doctrine in the present case is even stronger than that in *Sunnen,* for here the constitutional analysis of the earlier case is repudiated by this Court's intervening pronouncement"); *cf. United States v. Stauffer Chemical Co.,* 464 U.S. 165, 172 n. 5, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984) (noting that whatever the applicability of *Sunnen's* strict separable facts test in a tax case, it would not be applied generally in a non-tax case).

In a non-tax case, *Hicks v. Quaker Oats Co.,* 662 F.2d 1158, 1167 (5th Cir.1981), the Fifth Circuit questioned whether the *Sunnen* separable facts doctrine was still controlling law following *Montana.* The Fifth Circuit in *Hicks* did not wholly reject *Sunnen* in light of *Montana,* but did find that *Montana* limited the applicability of *Sunnen* to situations in which there have been major changes in the law. *Hicks,* 662 F.2d at 1167. In *dicta,* the *Hicks* court

opined that "it is likely that the 'separable facts' doctrine of *Sunnen* is a dead letter, since *Montana* involved separate documents with slightly differing language." [13] [FN13] *Id.* However, it is significant that *Hicks* was not a tax case. In a subsequent tax case that presented collateral estoppel issues, *Hibernia Nat'l Bank v. United States,* 740 F.2d 382, 387 (5th Cir.1984), the Fifth Circuit did not cite *Hicks.* Instead, the Court of Appeals relied on *Sunnen* in holding that collateral estoppel must be applied very narrowly in tax cases, and that in order for collateral estoppel to apply, the issues must be "identical in all respects." *Hibernia,* 740 F.2d at 387.

This Court has been presented with no Supreme Court or Fifth Circuit authority rejecting the *Sunnen* separable facts doctrine in tax cases.[14] Thus, the Court agrees with Weiner's conclusion in his Response to the United States' Motion to Reconsider that, "[i]n the area of tax law the

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[13] Although *Hicks* focused on the language of the contracts at issue in *Montana.* the United States Supreme Court was clear that the language of the contracts at issue was not the basis for the determination of the constitutional question. *Montana,* 440 U.S. at 159, 99 S.Ct. 970.

[14] Other circuits analyzing collateral estoppel issues in tax cases have cited *Sunnen* generally on collateral estoppel issues in the years following *Montana. See, e.g., Greene v. United States,* 79 F.3d 1348, 1352-53 (2nd Cir.1996) (relying primarily on *Montana* but citing *Sunnen* for the proposition that "each [tax] year is the origin of a new liability and of a separate cause of action"); *Coleman v. Commissioner,* 16 F.3d 821, 830 (7th Cir.1994) (citing *Sunnen* for the elements of collateral estoppel, including that the issues must be "identical in all respects"); *Carter v. United States,* 973 F.2d 1479, 1483 n. 1 (9th Cir.1992) (noting that although the Supreme Court has repudiated the separable facts doctrine in general, it has suggested that the doctrine may remain applicable in tax cases).

Sunnen separable facts doctrine is very much alive."[15] The United States' Motion to Reconsider the Court's collateral estoppel ruling is denied.

B. The Parties Did Not Settle the Issue of §6621(c) Interest

The United States contends that the Court erred in finding that the large, obvious disclaimer at the bottom of the SAASO was meant to apply to the entire SAASO instead of only to the paragraph that followed the disclaimer.[16] The Court stands by its ruling that the SAASO

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[15] If the Fifth Circuit were to determine that *Sunnen* is no longer controlling law, the Court, as stated in its Amended Memorandum Opinion, footnote 23, likely would find that the issues are sufficiently identical to warrant application of collateral estoppel. Weiner makes extensive argument in his Response to the United States' Motion to Reconsider that, even assuming a less restrictive approach to the identity of issues question, collateral estoppel does not apply because he was not a party, or in privity with a party, to the Tax Court cases, and the Tax Court did not have jurisdiction to decide the limitations question. Weiner made these arguments against collateral estoppel in his summary judgment briefing and the Court addressed them extensively in its decision. *See* Amended Memorandum Opinion, at 634 n. 12, 640-41, 644-45. In reaching its decision, the Court addressed the many reasons that support a ruling that Weiner was in privity with the TMP of TFA, but did not decide the question because denial of collateral estoppel was required based on *Sunnen*. Were it necessary to decide the issue, the Court would likely find privity for the reasons discussed in the Amended Memorandum Opinion. Therefore, the ruling of the Court granting the United States summary judgment on the 1984 statute of limitations issue would remain unchanged.

[16] In this regard, the United States has submitted the Second Supplemental Declaration of Jerry Gossett. Exhibit 2 to United States' Motion. Weiner objects to Gossett's Second Supplemental Declaration as not based on personal knowledge because Gossett swears it is true only "to the best of his knowledge and belief." The Court **overrules** Weiner's evidentiary objection, but notes that at best the Declaration creates an ambiguity in the SAASO, which would lead the Court to interpret the

was not a part of the Appeals Settlement Offer. *See* Amended Memorandum Opinion, at 655. However, it is not necessary to rely on the disclaimer to reach the Court's conclusion. In pursuing its settlement with Weiner, the IRS did not make a settlement offer to Weiner. Instead, the IRS sent a settlement package to Weiner that included a Form 870-P(AD), which, if signed and returned by Weiner, would constitute Weiner's settlement offer to the IRS. The IRS then had to accept Weiner's settlement offer in order to consummate the compromise agreement. The SAASO, assuming it was mailed to Weiner as part of the settlement package, which Weiner denies, was not incorporated by Weiner in his settlement offer to the IRS, which the IRS accepted. As stated in the cover letter to the IRS from Weiner's accountant that accompanied Weiner's executed Form 870-P(AD), "the settlement agreements do not apply to penalties." United States' Reply, at 11. The Court therefore rejects the United States' argument that the settlement included the SAASO. The Court next addresses Weiner's argument, made in response to the United States' Motion to Reconsider, that the United States waived its right to collect the §6621(c) interest.

Although the Form 870-P(AD) did not settle §6621(c) interest, Weiner clearly was aware that the IRS intended to assess such interest. Again, as stated in the cover letter to the IRS from his accountant, Weiner understood that "the I.R.C. §6621(c) interest penalty will be assessed." *Id.* The Form 870-P(AD) contained a notice that, if accepted by the IRS, the settlement agreement "may result in an additional tax liability to you plus interest as provided by law." Nonetheless, Weiner argues, as he did in his summary judgment briefing, that the United States should not be allowed to assess §6621(c) interest because the settlement

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document against its drafter, the United States. As stated in the text, the disclaimer is not necessary to the Court's ruling.

agreement did not specify any grounds for the deficiency that support such interest. The Court distinguished the primary cases relied upon by Weiner in support of this argument, *Todd v. Commissioner,* 862 F.2d 540 (5th Cir.1988), and *McCrary v. Commissioner,* 92 T.C. 827, 1989 WL 35568 (1989), in its Memorandum Opinion. *See* Amended Memorandum Opinion, at 656. Like those cases, the additional cases cited by Weiner are inapposite. *See Copeland v. Commissioner,*290 F.3d 326 (5th Cir.2002); *Law v. Commissioner,* 84 T.C. 985, 993, 1985 WL 15356 (1985); *Schachter v. Commissioner,* 67 T.C.M.(CCH) 3092 (1994); *Rogers v. Commissioner,*. 60 T.C.M. (CCH) 1386 (1990). Each of Weiner's cited cases involves a decision by the Tax Court to resolve the deficiency on a basis that did not support imposition of §6621(c) interest, or in which considerations of justice and equity weighed strongly against imposition of the penalty. In *Schachter,* the case cited by Weiner that is most similar to the case at bar, the taxpayer entered a concession wherein he agreed to a partial disallowance of his disputed loss deduction. Based on that concession, which did not state that the disallowance was due to a tax motivated transaction, the court declined to force the taxpayer to meet his burden of proof to show that the transaction was not tax motivated, all or in part, for the purpose of defeating the IRS's §6621(c) interest claim because:

> The objectives of administrative efficiency and judicial economy have been well served by the closing agreement and petitioner's concession. Those objectives would not be served by requiring trial on the substantive issues for the sole purpose of determining whether petitioner is liable for 20 percent more interest on the deficiency under section 6621(c).

Schachter, 67 T.C.M. at 3094, 1994 WL 263329. The *Schachter* court did not determine that *Todd* or *McCrary,* or

any other applicable law, prevented it from allowing the IRS to attempt to prove §6621(c) interest. The administrative efficiency and judicial economy concerns expressed in *Schachter* are not of paramount importance in the circumstances of the case at bar. [17] At least one other claim survived summary judgment and remains for trial in this case. In addition, unlike in *Schachter* in which the understatement attributable to the taxpayer's deduction was less than $1,000, there is a significant amount of §6621(c) interest at stake here.

Here, the parties agreed to resolve the deficiency issue without stating a specific grounds for the assessment, and with full knowledge that the IRS intended to assess §6621(c) interest. There is no authority for precluding the IRS from attempting to prove the applicability of such interest in this case.[18]

IV. CONCLUSION AND ORDER

The parties have not persuaded the Court that its March 31, 2002 Memorandum Opinion (as amended), was factually or legally erroneous. The Court has attempted to address thoroughly each and every issue raised by the parties, whether or not resolution of the issue was necessary to the Court's ultimate ruling. It is in the interests of justice and judicial economy that the parties be able upon appeal to obtain a definitive resolution of this stale case, which has been pending in this Court since early

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[17] The Court is unmoved by Weiner's argument that judicial efficiency concerns preclude the United States from litigating the §6621(c) interest issue post-settlement, when it is Weiner who initiated this litigation to contest his deficiency assessment that appeared to have been determined by the settlement.

[18] Weiner has not sought reconsideration of this Court's determination that it has jurisdiction to determine the §6621(c) claim. *See* Amended Memorandum Opinion, at 656-57.

2000 and involves tax years ending at least sixteen years ago. The Court supplements the rulings contained in the Amended Memorandum Opinion with this Memorandum and Order. It is therefore

ORDERED that Weiner's Motion for Reconsideration of Summary Judgment [Doc. # 65] and Supplement to Motion for Reconsideration [Doc. # 71] are **DENIED**. It is further

ORDERED that the United States' Motion for Reconsideration [Doc. # 73] is **DENIED**. It is further

ORDERED that the Court's Amended Memorandum Opinion is supplemented by this Memorandum and Order. It is further

ORDERED that the Court will conduct a telephone conference at **3:00 p.m. on November 26, 2002** to discuss the procedure and schedule for trial of the remaining claims in this case. Plaintiff is instructed to initiate the telephone conference.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARION S. KRAEMER and JOYCE W. Kraemer,	§	
Plaintiff,	§	
v.	§	No. CIV. H-00-2948.
UNITED STATES OF AMERICA,	§	
Defendant.	§	

MEMORANDUM OPINION

JOHNSON, Magistrate J.

Pending before the court[1] are the following motions: 1) Defendant's Motion for Partial Dismissal of Plaintiffs' Complaint; 2) Plaintiffs' Motion for Partial Summary Judgment Based on Statute of Limitations for 1984; 3) Defendant's Cross-Motion for Partial Summary Judgment Based on Statute of Limitations; and 4) Plaintiffs' Motion for Partial Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims. Also pending are three motions requesting extensions of time to file.

For the reasons discussed below, the court GRANTS Defendant's Motion for Partial Dismissal of Plaintiffs' Complaint based on 26 U.S.C. §6404(e) (Docket Entry No. 20). The court DENIES Plaintiffs' and Defendant's cross-motions for partial summary judgment on the statute of limitations issue (Docket Entry Nos. 22 and 29), but dismisses this claim sua sponte for lack of subject matter

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[1] The parties consented to proceed before the undersigned magistrate judge for all proceedings, including trial and final judgment, pursuant to 28 U.S.C. §636(c) and FED. R. CIV. P. 73. Docket Entry No. 16.

jurisdiction. The court DENIES Plaintiffs' Motion for Partial Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims (Docket Entry No. 23). The court GRANTS Plaintiffs' Motion for Leave to File Motion for Partial Summary Judgment Out of Time (Docket Entry No. 21), Plaintiffs' Motion to Extend Time to Reply to Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment (Docket Entry No. 26), and Defendant's Motion for Leave to File Cross-Motion for Partial Summary Judgment with Respect to the Statute of Limitations Issue Out of Time (Docket Entry No. 28). Plaintiffs' objections to the Declaration of Jerry Gossett are noted, but the declaration has no bearing on this opinion.

I. Case Background

Plaintiffs, a married couple, bring the present action to recover federal income tax, interest, and penalties which they assert were illegally assessed and collected for calendar years 1984 and 1986. Plaintiffs also seek an abatement of interest under 26 U.S.C. §6404(e).

Plaintiff Marion Kraemer was a partner in two limited partnerships. The tax assessment with regard to his partner shares of these partnerships is the subject of this refund action. Oasis Date Associates ("ODA") was a California limited partnership organized on or about July 1, 1984. The certificate of limited partnership listed Fred Behrens, Robert Wright, and George Schreiber as the only general partners of ODA. American Agri-Corp. ("AMCOR") was the managing agent of ODA and was responsible for the private placement offering of partnership units. [2]

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[2] In fact, AMCOR claimed to be responsible for private placement offerings of at least thirty other farming entities and also claimed to be the managing agent for these entities. See Plaintiffs' Motion for Partial Summary Judgment, Docket Entry No. 22, Ex. D, Confidential Private Placement Memorandum, pp. 36-40.

Plaintiff Marion Kraemer became a limited partner of ODA in 1984.

On March 22, 1985, the Internal Revenue Service ("IRS") Service Center at Fresno, California, received what purported to be the 1984 U.S. Partnership Return of Income (Form 1065) for ODA. That return was signed by Joseph O. Voyer ("Voyer") as "Treasurer" on January 25, 1985. In fact, Voyer was treasurer of AMCOR, not ODA. The ODA partnership return neither identified AMCOR as the managing agent of ODA nor disclosed any relationship between AMCOR and ODA. On April 15, 1985, Plaintiffs filed their U.S. Individual Income Tax Return (Form 1040) for the year 1984. On that return Plaintiffs included a deduction with respect to ODA.

By letter dated December 12, 1985, AMCOR agreed to purchase a .5% general partnership interest in ODA from general partners Behrens, Wright, and Schreiber. This was officially recorded on December 23, 1985, in the records of the Secretary of State for the State of California when an Amendment to the Certificate of Limited Partnership (Form LP-2) was filed.

Plaintiff Marion Kraemer was a limited partner of another partnership, Coachella Fruit Growers ("Coachella"), for 1986. Plaintiffs timely filed their U.S. Individual Income Tax Return (Form 1040) for the year 1986, in which they claimed a deduction related to Coachella. Coachella filed its partnership return (Form 1065) for 1986.

On March 14, 1990, the IRS issued a Notice of Final Partnership Administrative Adjustment ("FPAA") with respect to Coachella for the 1986 tax year. In that document, the IRS explained that the partnership losses that Coachella had reported ($7,832,935 of farming expenses and $208,526 of other expenses) were disallowed because, in part, "[t]he partnership's activities constituted

a series of sham transactions lacking economic substance.[3] A partnership level proceeding challenging the proposed partnership item adjustments for Coachella was commenced later that year in Tax Court.

Subsequently, on April 10, 1991, the IRS also issued to the Tax Matters Partner of ODA a FPAA for the years 1984 and 1985. Again, the attached Explanation of Adjustments noted that the 1984 losses that ODA had reported ($4,696,859 of farming expenses, $113,071 of other expenses, and $288 for interest expense) were disallowed because ODA's activities constituted a series of sham transactions.[4] On July 10, 1991, a partner of ODA filed a petition in Tax Court challenging the proposed tax assessments. One of the defenses asserted was that the assessment for 1984 was time-barred.

Plaintiffs filed an Amended U.S. Individual Income Tax Return (Form 1040X) for the year 1986. On the amended return, filed in October 1991, Plaintiffs reduced the amount of their Coachella deduction. Shortly thereafter, Plaintiffs paid the tax and interest as assessed based on the amended return for 1986. In March 1992, Plaintiffs submitted a cash bond in the amount of $37,860 with respect to any liability for increased income tax resulting from the FPAA for ODA.

While the ODA petition lingered in Tax Court, Plaintiffs attempted to settle their individual liability. On December 20, 1996, the IRS sent to Plaintiffs, in care of their attorney, proposals for resolving their income tax liabilities for 1984 as it related to ODA and for 1986 as it related to Coachella.

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[3] Defendant's Response to Plaintiffs' Motion for Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims, Docket Entry No. 25, Ex. 8, FPAA for Coachella.

[4] Defendant's Response to Plaintiffs' Motion for Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims, Docket Entry No. 25, Ex. 9, FPAA for ODA.

According to Defendant, included in the packet soliciting an offer of settlement was a Summary of the AMCOR Appeals Settlement Offer ("SAASO") which included a statement that interest would be computed under 26 U.S.C. §6621(c).[5] On March 27, 1997, Plaintiffs, through their accountant, executed the requisite Forms 870-P(AD) to the IRS, and the IRS accepted Plaintiffs' settlement offers on April 28, 1997. The letter included with the Forms 870-P(AD) stated:

> We are also concerned that the settlement agreements do not apply to penalties. Although my clients do not believe they should be subject to any penalties, they have decided to proceed because it is our understanding that the Internal Revenue Service will assert only that the I.R.C. §6621(c) interest penalty applies and will not assert any other penalties. We understand that the I.R.C. §6621(c) interest penalty will be assessed.[6]

On November 7, 1997, the IRS advised Plaintiffs of the adjustments to their income that would be made as a result of the settlements. On December 22, 1997, the IRS assessed 1984 tax, interest, and penalty interest against Plaintiffs in the amount of $29,758.25 (including $3,150.90 of 26 U.S.C. §6621(c) penalty interest). In February 1998, the IRS determined that Plaintiffs had overpaid taxes for 1986 because the settlement allowed greater deductions than those Plaintiffs reported in their amended return. Although

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[5] See Defendant's Response to Plaintiffs' Motion for Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims, Docket Entry No. 25, Ex. 12, Letter (with enclosures) dated Dec. 20, 1996, from Deborah S. Decker, Director of IRS Service Center, to ODA partners. Plaintiffs dispute that the SAASO was included with this letter or with the settlement solicitation packet for the Coachella partnership items.

[6] Defendant's Response to Plaintiffs' Motion for Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims, Docket Entry No. 25, Ex. 16, Letter (with enclosures) dated Mar. 27, 1997, from Robert W. Vacek to IRS Center.

the IRS abated tax in the amount of $213 for 1986, it assessed penalty interest under 26 U.S.C. §6621(c) in the amount of $4,088.26. Applying Plaintiffs' 1992 deposit first to the 1984 assessment, the IRS transferred the remaining deposit balance of $8,101.75 to Plaintiffs' 1986 liability and refunded the balance.

On June 24, 1998, Plaintiffs filed claims for refund (Forms 843) for 1984 in the amounts of $13,159 for tax and $16,599 for interest and for 1986 in the amounts of $14,787 for tax and $12,763 for interest. Plaintiffs checked the boxes on both years' claim forms for abatement of "[i]nterest caused by IRS errors and delays."[7] In August 1998, the IRS denied Plaintiffs' claims for refund.

Around December 1999, counsel for the Tax Matters Partner of ODA and counsel for the IRS executed a "Stipulation to be Bound" in which the parties agreed that the outcome of the statute of limitations issue presented in the ODA Tax Court petition would be determined in a manner consistent with the outcome of other limited partnerships managed by AMCOR.

On August 25, 2000, the Kraemers filed the present complaint, asserting numerous grounds of recovery of tax and interest for both years, including: 1) the interest should have been abated under 26 U .S.C. §6404(e) for errors and delays caused by the IRS; 2) the 1984 assessment was barred by limitations; and 3) the 26 U.S.C. §6621(c) penalty interest was improperly assessed.

On August 28, 2000, the Tax Court, in the consolidated action entitled *Agri-Cal Venture Assocs. v. Commissioner*, issued a published opinion on the statute of limitations issue common to the AMCOR limited partnerships. 80

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[7] Plaintiffs' Original Complaint, Docket Entry No. 1, Exs. B and E, Claims for Refund and Request for Abatement (Forms 843) for 1984 and 1986, respectively.

T.C.M. (CCH) 295 (2000). The Tax Court found that the FPAA for 1984 was timely because no valid partnership return had been filed which would have fixed the time to assess a tax under 26 U.S.C. §6229(a). The Tax Court rejected the petitioners' arguments that the signature of Voyer, the treasurer of AMCOR, a nonpartner, satisfied the statutory requirement that a partnership return be signed by a partner. Without a valid signature, the document was not considered a return which would have commenced the running of limitations. Based on the stipulation by the ODA tax matters partner, ODA's argument that limitations had run on its 1984 FPAA also failed.

II. Defendant's Motion for Partial Dismissal

Defendant moves the court to dismiss Plaintiffs' interest abatement claim for lack of subject matter jurisdiction.

A. Dismissal Standard

A motion to dismiss for lack of subject matter jurisdiction falls under FED. R. CIV. P. 12(b)(1). The plaintiff bears the burden of demonstrating the district court has subject matter jurisdiction. *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir.1998). "A court may base its disposition of a motion to dismiss for lack of subject matter jurisdiction on (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 904 (5th Cir.1997).

B. 26 U.S.C §6404(e)-Interest Abatement Claim

The IRS may abate deficiency interest under certain circumstances. 26 U.S.C. §6404(e). Under the version of 26 U.S.C. §6404(e) which is applicable to taxable years prior to July 30, 1996, interest could be abated if the deficiency resulted from errors or delays caused by IRS employees in

the performance of ministerial tasks.[8] Id. The statute was silent on judicial review.

Upon consideration of whether district courts had subject matter jurisdiction to review the IRS's denial of a request for abatement pursuant to this code section, several circuit courts took the position that the district courts did not have that power. *See Argabright v. United States*, 35 F.3d 472 (9th Cir.1994); *Selman v. United States*, 941 F.2d 1060 (10th Cir.1991); *Horton Homes, Inc. v. United States* , 936 F.2d 548 (11th Cir.1991). The Eleventh Circuit held that 28 U.S.C. §1346 conferred jurisdiction on district courts over actions to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws," including interest. *Horton Homes, Inc.*, 936 F.2d at 550 (quoting 28 U.S.C. §1346); *see also Selman*, 941 F.2d at 1061-62. Yet, even though the district courts are able to hear cases for the recovery of interest pursuant to the jurisdictional statute, their power is subject to the Administrative Procedures Act ("APA"), which dictates when a court may review a decision of an agency. *Selman*, 941 F.2d at 1062; *Horton Homes, Inc.*, 936 F.2d at 550-51. The three circuit courts found that review of 26 U.S.C. §6404 decisions fell within the exceptions to the application of the APA*Argabright*, 35 F.3d at 476;*Selman*, 941 F.2d at 1064; *Horton Homes, Inc.*, 936 F.2d at 553, 554. Because 26 U.S.C. §6404 failed "to provide a court with any substantive standards by which to review the agency's action," the statute committed the abatement decisions absolutely to the discretion of the IRS and barred district

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[8] The Taxpayer Bill of Rights 2 ("TBOR2") included an amendment to 26 U.S.C. §6404(e) which contained two notable changes. See TBOR2, Pub.L. No. 104-168, §301, 110 Stat. 1452 (1996). Congress added the word "unreasonable" to modify "error or delay" and expanded coverage to IRS managerial, as well as ministerial, acts. Id. These amendments, however, are effective only for tax years after July 20, 1996, the date of enactment. Id. Therefore, the changes do not apply to this case.

courts from exercising jurisdiction over these matters. *Selman*, 941 F.2d at 1063; *see also Argabright*, 35 F.3d at 475-76; *Horton Homes, Inc.*, 936 F.2d at 552, 553.

The message derived from this pre-TBOR2 line of cases is clear: Federal district courts lacked the authority to hear cases challenging the IRS's refusal to abate interest under 26 U.S.C. §6404(e). *Argabright*, 35 F.3d at 476 ("[J]udicial review is not available for agency action taken pursuant to 26 U.S.C. §6404(e)(1) ."); *Selman*, 941 F.2d at 1064 ("We thus conclude that the language, structure and legislative history of I.R.C. §6404(e)(1) indicate that Congress meant to commit the abatement of interest to the Secretary's discretion and therefore, 5 U.S.C. §701(a)(2) precludes judicial review."); *Horton Homes, Inc.*, 936 F.2d at 554 ("[E]ach of 5 U.S.C. §701(a)(1) and (a)(2) is applicable and bars a federal district court from exercising its jurisdiction to review the failure of the IRS to abate interest pursuant to section 6404(e)(1).").

In 1996, Congress added a provision to 26 U.S.C. §6404 specifically addressing the taxpayer's right to have the IRS's denial of abatement reviewed. TBOR2, Pub.L. No. 104-168, §302, 110 Stat. 1452 (1996). "The Tax Court shall have jurisdiction over any action brought by a taxpayer ... to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement." 26 U.S.C. §6404(i). Unlike the other 1996 amendments to 26 U.S.C. §6404, this one applies to requests for abatement submitted to the IRS after July 30, 1996, regardless of the coinciding tax year. TBOR2, Pub.L. No. 104-168, §302(b), 110 Stat. 1452 (1996).

Defendant's motion for partial dismissal of Plaintiffs' claims under 26 U.S.C. §6404(e) presents four separate arguments under a broader assertion that the court lacks subject matter jurisdiction. Defendant argues that: 1) the waiver of sovereign immunity with respect to 26 U.S.C.

§6404(i) is limited to suits brought in the Tax Court; 2) the 180-day filing requirement is also a condition of the waiver of sovereign immunity; 3) the doctrine of variance precludes this court's review of Plaintiffs' request for refund of interest; and 4) the acts about which Plaintiffs complain do not justify interest abatement because they all occurred prior to the IRS contacting Plaintiffs in writing about their tax deficiencies and are ministerial in nature.

In their response, Plaintiffs argue that the changes imposed by TBOR2 on 26 U.S.C. §6404 supplant pre-TBOR2 case law. Specifically, they claim that Congress acknowledged that judicial review of abatement denials was not precluded and that Congress provided an "abuse of discretion" standard by which courts could evaluate the Secretary's decision. Additionally, Plaintiffs argue that Congress never intended to give the Tax Court exclusive jurisdiction over 26 U.S.C. §6404 matters. Plaintiffs also counter each of Defendant's other points; however, because the court finds for Defendant on the issue of judicial review, the court reaches none of the other asserted reasons for dismissal.

To determine whether Congress intended to supersede the previous line of cases, this court turns to the legislative history of TBOR2. The explanation contained within the House Report which accompanied the bill states:

> *Present law*
>
> Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest.
>
> *Reasons for change*
>
> The Committee believes that it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers.
>
> *Explanation of provision*

> The bill grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer was an abuse of discretion. The Tax Court may order an abatement of interest. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest. An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees. No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest.

H.R. REP. NO. 104-506, at 28 (1996).

Plaintiffs' arguments notwithstanding, the court finds no indication in this report that Congress intended to grant federal district courts the power to review the IRS's failure to abate interest.[9] The court agrees with Plaintiffs that, by granting the Tax Court the power to review IRS decisions, the statute no longer commits the action absolutely to agency discretion as was the case prior to TBOR2. Unfortunately for Plaintiffs, this does not change the end result. Defendant's motion is not based on the pre-TBOR2 case law, but, rather, on its immunity from suit absent clear waiver. The court has jurisdiction over Plaintiffs' action only to the extent that it conforms not only with 28 U.S.C. §1346(a)(1), but also "with other statutory provisions

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[9] Plaintiffs glean from the comment, "No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest," that Congress believed "that judicial review was not previously precluded." See Plaintiffs' Response to Defendant's Motion for Partial Dismissal of Plaintiffs' Complaint, Docket Entry No. 30, p. 4. Congress may have chosen not to offer its opinion on the state of the law regarding judicial review. However, Congress acknowledged that federal district courts generally lack jurisdiction to review abatement decisions and provided no indication that it intended otherwise. See H.R. REP. No. 104-506, at 28 (1996).

which qualify a taxpayer's right to bring a refund suit upon compliance with certain conditions." *United States v. Dalm*, 494 U.S. 596, 601, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990). With regard to TBOR2, Congress set very clear limits on the waiver of sovereign immunity with regard to the review of 26 U.S.C. §6404 decisions.

The earlier case law is important, but only to the extent that it defines the starting point from which Congress fashioned an exception to the law on judicial review of 26 U.S.C. §6404 issues. In enacting TBOR2, Congress first acknowledged the district courts' powerlessness to review abatement decisions and then granted the Tax Court, alone, that jurisdictional power. This is the only plausible reading of 26 U.S.C. §6404(i).[10] Other district courts considering the issue have reached the same conclusion. *See Beall v. United States*, 170 F.Supp.2d 709, 711 (E.D.Tex.2001); *Davies v. United States*, 124 F.Supp.2d 717, 721 (D.Me.2000).

Accordingly, the court finds that it lacks subject matter jurisdiction to review Plaintiffs' interest abatement claim. Defendant's motion for partial dismissal is GRANTED as to this claim.

III. Motions for Summary Judgment

Plaintiffs and Defendant have filed cross-motions for summary judgment on the issue of the timeliness of the tax assessment for the 1984 year related to ODA. Plaintiffs also filed a partial summary judgment motion on the issue of their refund claims for 26 U .S.C. §6621(c) penalty interest for 1984 and 1986.

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[10] Plaintiffs suggest that Congress intended jurisdiction be bifurcated between the Tax Court, for prepayment suits, and the district courts, for refund suits. The court finds no support in 26 U.S.C. §6404 or its legislative history for this position.

A. Summary Judgment Standard

Pursuant to FED. R. CIV. P. 56(c), the party moving for summary judgment has the burden of showing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The movant must inform the court of the basis for the summary judgment motion and must point to relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of genuine factual issues. FED. R. CIV. P. 56(c); *Celotex Corp.*, 477 U.S. at 323; *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.1992), *cert. denied*, 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). When determining whether any dispute exists, the court must view the "facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Meinecke v. H & R Block of Houston*, 66 F.3d 77, 81 (5th Cir.1995).

A court may dismiss, sua sponte, a complaint for lack of subject matter jurisdiction, but first should give the plaintiff notice and the opportunity to respond. *Benson v. O'Brian*, 179 F.3d 1014, 1015 (6th Cir.1999).

B. Statute of Limitations on Tax Assessment

Generally, a district court has subject matter jurisdiction over refund claims. 28 U.S.C. §1346(a)(1). However, "[n]o action may be brought for a refund attributable to partnership items." 26 U.S.C. §7422(h). Thus, this court's jurisdiction depends on whether Plaintiffs' refund claims relate to partnership or nonpartnership items.

A partnership item is "any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle,

such item is more appropriately determined at the partnership level than at the partner level." 26 U.S.C. §6231(a)(3). Corresponding Treasury Regulations provide specific items including "partnership aggregate and each partner's share of each of the following: ... [i]tems of income, gain, loss, deduction, or credit of the partnership," all of which are items appearing on the partnership return. 26 C.F.R. §301.6231(a)(3)-1(a)(1). Conversely, a nonpartnership is an item that is not a partnership item; it is an item that depends upon the circumstances of the individual partner rather than upon variables applicable to the entire partnership. 26 U.S.C. §6231(a)(4); *see also Slovacek v. United States*, 40 Fed. Cl. 828, 829 (1998).

The significance of the distinction between partnership items and nonpartnership items is derived from the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub.L. No. 97-248, §402, 96 Stat. 324 (1982), codified as 26 U.S.C. §§6221-6233.*See Alexander v. United States*44 F.3d 328, 330 (5th Cir.1995). Partnerships are not directly subject to income tax; rather, partners are liable for the tax in their individual capacities. 26 U .S.C. §701. Congress specifically designed TEFRA to ensure consistent treatment for all partners in a partnership and to reduce the burden of determining partnership-related tax issues repeatedly at the individual partner level. *See Slovacek v. United States*, 36 Fed. Cl. 250, 254 (1996) (citing H.R. REP. NO. 97-760, at 599-600 (1982)). A key provision of the TEFRA legislation is now codified as 26 U.S.C. §6221 and provides that the tax treatment of all partnership items must be determined at the partnership level. 26 U.S.C. §6221. That way, partnership items are adjusted once at the partnership level, and all partners whose tax liability will be affected by

the outcome have the opportunity to participate in the administrative proceeding.[11] 26 U.S.C. §§6223; 6224(a).

Upon completion of the administrative proceeding, the IRS may adjust items reported on the partnership's information return (Form 1065) by mailing to the tax matters partner and to all "notice" partners an FPAA. 26 U.S.C. §6223. Any challenges to the FPAA adjustments may be raised in a petition for judicial review. 26 U.S.C. §§6226(a) and (b). As with the administrative proceeding, each partner shall be treated as a party to the court action and shall be bound by its outcome. 26 U.S.C. §6226(c). [12] Should an individual partner choose to settle with the IRS before the completion of the partnership proceedings, that partner no longer has an interest in the outcome of the partnership level litigation and may not participate in or be bound by the judicial determinations. 26 U.S.C. §6226(d), see also 26 U.S.C. §6228(a)(4)(B) (regarding judicial review

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[11] The administrative proceeding generally includes an audit and internal appeals of the auditor's findings. A partner may request administrative adjustment of the partnership return. 26 U.S.C. §6227. Rules similar to those applicable to IRS-initiated administrative adjustments apply to judicial review if these requests are not granted in full. See 26 U.S.C. §6228.

[12] 26 U.S.C. §6226(c) provides as follows:

> (c) Partners treated as parties. If an action is brought under subsection (a) [petition by a tax matters partner] or (b) [petition by partner other than tax matter partner] with respect to a partnership for any partnership taxable year-
>
> > (1) each person who was a partner in such partnership at any time during such year shall be treated as a party to such action, and
> >
> > (2) the court having jurisdiction of such action shall allow each such person to participate in the action.

of administrative adjustments requested by a partner and not granted in full). Rather, the settling partner and the IRS are bound according to the terms of the agreement "to the determination of partnership items for such partnership taxable year." 26 U.S.C. §6224(c)(1).

When a partner settles, the partner's share of a partnership item becomes a nonpartnership item. 26 U.S.C. §6231(b)(1)(C). "That is because the value or treatment of the item in the hands of the individual partner is determined solely by the terms of the settlement agreement and the taxpayer's own circumstances, and not by any subsequent tax determination with respect to the partnership." *Slovacek*, 40 Fed. Cl. at 830. The settling partner is liable in proportion to the partner's share in the partnership item. *Id.* at 829-30.

The IRS is limited to three years after the later of the date on which the partnership return was filed or the date on which it was due to be filed, if filed early, during which the IRS may assess income tax on a partner attributable to any partnership item. 26 U.S .C. §6229(a). The limitations period is suspended upon notice of an FPAA or may be extended by agreement between the IRS and an individual partner or the partnership as a whole through the tax matters partner. 26 U.S.C. §§6229(b) and (d).[13]

In the present case, ODA filed what purported to be its 1984 partnership return on March 22, 1985; the due date of the return was April 15, 1985. Thus, the IRS had until April 15, 1988, to assess tax against the individual partners or to issue an FPAA to suspend the running of the limitations period.

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[13] In the present case, neither party asserts that the statute of limitations was extended by agreement.

In his appeal of the FPAA to the Tax Court, the ODA tax matters partner asserted that the FPAA issued on April 10, 1991, was untimely. The IRS countered that the 1984 ODA partnership return was not signed by a partner as required by statute and did not qualify as a return which commenced the limitations period.[14] Because this issue was common to all AMCOR-managed partnership returns, the tax matters partner stipulated that ODA would be bound by a ruling on this issue by the Tax Court in a related case. On August 28, 2000, the Tax Court ruled against the partnerships, finding that the FPAA for the 1984 tax year was not barred by limitations because the purported return was not considered a return for commencing the statute of limitations. Based on the stipulation by the tax matters partner, ODA was bound to accept that ruling.

Plaintiffs argue that they are not bound by the Tax Court ruling for a number of reasons. Instead, they seek an independent decision from this court that the FPAA for the 1984 tax year was untimely. The court need not reach these issues.

It has been held that a statute of limitations challenge related to the administrative adjustment of partnership return is considered a challenge to a partnership item. See, *e.g.*, *Chimblo v. Commissioner*, 177 F.3d 119, 125 (2nd Cir.1999), *cert. denied*, 528 U.S. 1154, 120 S.Ct. 1159, 145 L.Ed.2d 1071 (2000) (joining other courts in holding that, under TEFRA, a statute of limitations defense is a partnership item); *Williams v. United States*, 165 F.3d 30 (6th Cir.1998) (table), 1998 WL 537579, at *3, unpublished disposition, ("It is well established that statute of limitations challenges are considered challenges to a

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[14] 26 U.S.C. §6229(c)(3) provides that "[i]n the case of a failure by a partnership to file a return for any taxable year, any tax attributable to a partnership item (or affected item) arising in such year may be assessed at any time."

partnership item."); *Kaplan v. United States*, 133 F.3d 469, 473 (7th Cir.1998) (holding that statute of limitations issue is a partnership item for which jurisdiction is barred by 26 U.S.C. §7422(h)); *Clark v. United States*, 68 F.Supp.2d 1333, 1344 (N.D.Ga.1999) (agreeing with other courts that a TEFRA statute of limitations issue should be decided at the partnership level); *Thomas v. United States* , 967 F.Supp. 505, 506 (N.D.Ga.1997) (finding that the TEFRA statute of limitations was a partnership item over with the district court did not have jurisdiction); *Barnes v. United States*, 1997 WL 732594, at *3 (M.D.Fla.1997), *aff'd*, 158 F.3d 587 (11th Cir.1998) (holding that whether a partnership had extended the limitations period was a partnership item under TEFRA).[15]

Otherwise, an individual partner who succeeded on his challenge to the timeliness of the FPAA would cause a landslide of litigation and would affect the tax liability of all of the partnership's partners. This is exactly the type of piecemeal litigation that TEFRA was intended to prohibit and for which the court lacks jurisdiction.

Plaintiffs cite *Alexander*, as supporting their contention that this court has jurisdiction to resolve the limitations issue because the settlement agreement with the IRS converted the partnership items into nonpartnership items over which the court has jurisdiction. 44 F.3d at 328. Although a difficult case in many respects, *Alexander* is limited to the facts presented there, facts which distinguish it from the case now before the court.

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[15] For the same reason, challenges to the authority of the tax matters partner have also been held to be "partnership items" required to be determined at the partnership level in the Tax Court. *See Kaplan*, 133 F.3d at 473; Clark, 68 F.Supp.2d at 1345; *Klein v. United States* , 86 F.Supp.2d 690, 696 (E.D.Mich.1999).

In *Alexander*, the plaintiff included on his timely-filed 1984 tax return income attributable to a partnership interest.[16] Id . at 329. On May 16, 1988, the IRS mailed to the plaintiff a FPAA which proposed an increased tax liability on his return. Id. Along with the FPAA, the IRS included a Form 870-P, then known as a "Settlement Agreement for Partnership Adjustments." *Id.* The plaintiff was informed that, if he signed the form, it would constitute an offer to enter into a "binding settlement" to accept the FPAA adjustments. Id. He signed the form and paid the deficiency. *Id.* at 330.

Over a year after making the payment, the plaintiff learned that another partner had challenged the timeliness of the FPAA issued to the partnership. *Id.* In that Tax Court proceeding, the IRS conceded that the statute of limitations for assessing any deficiency on the 1984 year had expired on April 15, 1988. *Id.* Upon learning that his prior payment of the deficiency appeared to be an overpayment in light of the Tax Court decision, the plaintiff timely filed a claim for refund. *Id.*

The IRS argued that 26 U.S.C. §7422(h) deprived the court of jurisdiction over the plaintiff's refund claim because it related to the tax treatment of a partnership item. *Id.* at 331. The critical issue was whether the refund action was attributable to a partnership or nonpartnership item. Characterizing the item to which the refund was attributable as "adjustments called for in the FPAA to the ... partnership return," the court found that it was a partnership item. [17] Id. However, the court found jurisdiction over the refund action based on the 26 U.S.C.

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[16] Under 26 U.S.C. §6229, a FPAA was required to have been issued by April 15, 1988, in order to suspend the limitations period.

[17] The Fifth Circuit did not state specifically that the statute of limitations issue was a partnership item. *See Alexander*, 44 F.3d at 331.

§6231(b)(1)(C) conversion of partnership items to nonpartnership items at settlement. *Id.*

Accepting the IRS's concession and the decision of the Tax Court that the FPAA was issued after the limitations period for assessment had expired, the court did not make any independent factual determinations or legal conclusions on the issue of the timeliness of the FPAA. *Id.* at 330. The Fifth Circuit did not render any substantive decision on the limitations issue itself; rather, it applied the Tax Court decision in determining whether the plaintiff's remittance was an overpayment which necessitated a refund. Id. Assuming, then, that the FPAA had been issued outside the limitations period and deciding that the court did have jurisdiction over a post-settlement refund claim, the Fifth Circuit quickly moved to the heart of its opinion, whether the plaintiff had waived his right to refund via the settlement agreement. *Id.* at 331-33.

As suggested by *Alexander*, whether the FPAA was timely filed is a partnership item.[18] This is so because the ultimate issue is the "propriety of the adjustments to the partnership's ... tax return." *Kaplan*, 133 F.3d at 473. If the FPAA was timely, then the adjustments are valid and the tax and interest is greater for the entire partnership, i.e., for all partners. Any decision on this issue affects all partners' liability in proportion to their share. If each partner is allowed to individually litigate the timeliness of the FPAA, then TEFRA will not have the intended effect of

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[18] It is important to differentiate between the one-year limitations period for the assessment of tax following the finalization of the adjustment proceedings and the three-year limitations period following the filing of the partnership return. The first is unique to each partner. *See Thomas*, 967 F.Supp. at 506. The latter affects the entire partnership. *See id.*

avoiding multiple suits and, potentially, inconsistent decisions at the partner level.[19]

In *Alexander*, the tax court proceedings had concluded, in the partners' favor no less. 44 F.3d at 330. Exercising jurisdiction over the plaintiff's refund claim based on the expiration of the statute of limitations would not interfere with the partnership proceedings and posed no conflict with the aims of TEFRA. Here, of course, the situation is quite the opposite. Plaintiffs ask this court to go behind the settlement agreement in order to reach a conclusion contrary to that reached in the Tax Court. This is the point at which the analysis in *Alexander* is no longer applicable. This court does not read *Alexander* so broadly as to allow taxpayers to litigate partnership matters which have been converted to nonpartnership items by settlement agreements.[20] To permit such a result would overturn the TEFRA requirement that partnership items be litigated at the partnership level and would allow multifarious litigation at the individual taxpayer level, the exact

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[19] As case in point, Plaintiffs ask the court to issue a decision contrary to that of the Tax Court related to this case. If the court did so, then presumably each of the partners remaining in the Tax Court proceeding could settle with the IRS in order to seek reconsideration of the statute of limitations issues at the district court level.

[20] The court notes that Plaintiffs' position on the 26 U.S.C. §6621(c) issue, discussed below, is that this court does not have jurisdiction to make partnership item determinations, despite the conversion upon settlement. "[Plaintiffs'] Forms 870-P(AD) are comprehensive and settled all [their] partnership items. The items affirmatively set out in the agreement are settled on those terms. All others are deemed accepted as filed.... The IRS is deemed to have abandoned any adjustment it may have proposed on those bases." Plaintiffs' Supplemental Brief, Docket Entry No. 39, p. 22. The court agrees and finds that the restriction is applicable here as well. By accepting the adjustments, Plaintiffs abandoned their arguments that the adjustments were in any manner incorrect or improper.

scenario which TEFRA was designed to prevent. *Cf. Chimblo*, 177 F.3d at 125; *Kaplan*, 133 F.3d at 473. To say the Fifth Circuit intended to undermine the goals of TEFRA by allowing partners to settle with the IRS in order to have the district court review partnership items is far too simplistic a reading of *Alexander*. This court is, therefore, unwilling to extend *Alexander* to the present scenario.

Plaintiffs had the right to participate in the partnership level proceeding. Once Plaintiffs entered into a settlement agreement on the partnership items, they relinquished their right to litigate those items as a matter of law because the only forum available by law to do so was in a partnership level proceeding. The partnership chose to litigate the matter before the Tax Court.[21] The conversion of the partnership items to nonpartnership items pursuant to 26 U.S.C. §6231(b)(1)(C) may not be used to make an "end run" around the jurisdictional prohibition of 26 U.S.C. §7422(h).

Accordingly, the court finds that, although jurisdiction exists over Plaintiffs' refund claim as a whole, the court lacks jurisdiction to hear the merits of the taxpayers' statute of limitations argument. The court recognizes that the court's decision raises issues not fully briefed by the parties. As this ruling concerns subject matter jurisdiction, it is incumbent upon the court to raise the issue sua sponte. The court's decisions rest on what appear to be undisputed facts. However, the court will allow Plaintiffs ten days to submit, in the form of a motion for reconsideration, additional facts supporting jurisdiction. The court will not entertain briefs based solely on legal arguments derived from *Alexander*.

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[21] 26 U.S.C. §6226(a) provides that judicial review of the FPAA may be had in the Tax Court, the U.S. district court for the district in which the partnership's principal place of business is located, or the Court of Federal Claims.

C. 26 U.S.C. §6621(c)-Tax Motivated Transactions

26 U.S.C. §6621(c), now repealed, was enacted in 1984 (originally as subsection (d)) to encourage settlement of tax shelter cases. H.R. REP. 98-861, at 985 (1984). During the period of enactment, the section applied to interest accruing between December 31, 1984, and December 31, 1989. The section allowed the IRS to assess interest at 120% of the usual underpayment rate for "any substantial underpayment attributable to tax motivated transactions." 26 U.S.C. §6621(c)(1). Tax motivated transactions included valuation overstatement, losses disallowed by 26 U.S.C. §465(a) and credits disallowed by 26 U.S.C. §46(c)(8), straddles, substantial distortions of income due to specified accounting methods, sham or fraudulent transactions. 26 U.S.C. §6621(c)(3)(A).

The Fifth Circuit has held that "[a] sham or fraudulent transaction includes transactions that were not entered into for profit and are without economic substance." *Lukens v. Commissioner*, 945 F.2d 92, 99 (5th Cir.1991) (*citing Patin v. Commissioner*, 88 T.C. 1086, 1987 WL 49318 (1987)*aff'd without opinion sub nom., Hatheway v. Commissioner*, 856 F.2d 186 (4th Cir.1988), and *aff'd. sub nom ., Skeen v. Commissioner*, 864 F.2d 93 (9th Cir.1989), and *aff'd. without opinion*, 865 F.2d 1264 (5th Cir.1989), and *aff'd. sub nom., Gomberg v. Commissioner*, 868 F.2d 865 (6th Cir.1989)); *see also Durrett v. Commissioner* , 71 F.3d 515, 517 (5th Cir.1996); *Chamberlain v. Commissioner*, 66 F.3d 729, 732 (5th Cir.1995); but *see Patin*, 88 T.C. at 1129 (suggesting that a sham transaction is one that either was not entered into for profit or was without economic substance).

By virtue of Congress's enactment of the statute, the IRS has the authority to assess 26 U.S.C. §6621(c) penalty interest. A taxpayer challenging the IRS's assessment bears the burden of proving that the assessment was improper. *Melton v. Teachers Ins. & Annuity Ass'n of Am.* , 114 F.3d

557, 560 (5th Cir.1997) (*citing Westbrook v. Commissioner*, 68 F.3d 868, 876 (5th Cir.1995)).

Plaintiffs' primary argument is that the IRS cannot assess 26 U.S.C. §6621(c) interest against them because they did not agree, in the Forms 870- P(AD), either to the assessment of the penalty interest or to facts which would support a finding that the partnerships were tax motivated transactions. They rationalize that the reasons for the adjustments were not outlined in the Forms 870-P(AD); and, therefore, the IRS cannot show that the adjustments were attributable to a tax motivated transaction as defined in 26 U.S.C. §6621(c). Further, Plaintiffs argue that whether a business transaction is tax motivated is based on determinations at both the partner and partnership level and that this court, pursuant to 26 U.S.C. §6230(c)(4), is now barred from making a partnership determination. They conclude that the assessment of 26 U.S.C. §6621(c) interest is improper.

Defendant asserts that Plaintiffs, in fact, did consent to the assessment of 26 U.S.C. §6621(c) interest. Defendant claims that the SAASO was included with the Forms 870-P(AD) and stated that 26 U.S.C. §6621(c) penalty interest would be assessed. In the cover letter sent with the Forms 870-P(AD), Plaintiffs' accountant acknowledged that Plaintiffs would be assessed 26 U.S.C. §6621(c) interest. Defendant argues that this evidence indicates that the interest assessment was part of the settlement or, at the very least, creates a fact issue on whether it was part of the settlement. Regardless of the court's decision with regard to this matter, Defendant contends that the IRS is entitled to a presumption that the assessment is correct. Plaintiffs bear the burden, according to Defendant, to prove otherwise.

The court finds that, although the Forms 870-P(AD) contain the warning that the settlement "may result in an

additional tax liability to you plus interest as provided by law," this does not amount to an agreement to the assessment of 26 U.S.C. §6621(c) penalty interest.[22] Despite the attention given the issue of whether the parties agreed to an assessment of 26 U.S.C. §6621(c) interest, it is of no import. Clearly, the Forms 870-P(AD) were intended to settle partnership items. As both parties acknowledge, the 26 U.S.C. §6621(c) interest is an affected item, to be resolved at the partner level. So, the court's agreement that the 26 U.S.C. §6621(c) assessment was not part of the settlement does not compel the result Plaintiffs propose. The court finds that the IRS had the authority to assess penalty interest after settlement of the partnership items and that Plaintiffs bear the burden of producing facts to show the assessment was improper, i.e., the partnerships were not tax motivated transactions.

Plaintiffs present *Todd v. Commissioner*, 862 F.2d 540 (5th Cir.1988), and *McCrary v. Commissioner*, 92 T.C. 827, 1989 WL 35568 (1989), in support of their position that the IRS is not allowed, in this case, to assess 26 U.S.C. §6621(c) interest because the reasons for its assessment are not included in the Forms 870-P(AD). In *Todd*, the underpayment was not attributable to a valuation overstatement, but to the failure to place the property in service during the period for which deductions were taken. 862 F.2d at 543. Accordingly, the assessment of a 26 U.S.C.

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[22] Defendant's Response to Plaintiffs' Motion for Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims, Docket Entry No. 25, Ex. 16, Forms 870-P(AD) for ODA and Coachella. However, the evidence leaves little room for doubt that Plaintiffs were aware that the IRS planned to make the assessment based on a finding that the partnerships were sham transactions. See Defendant's Response to Plaintiffs' Motion for Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims, Docket Entry No. 25, Ex. 8, FPAA for Coachella; Ex. 9, FPAA for ODA; Ex. 16, Letter (with enclosures) dated Mar. 27, 1997, from Robert W. Vacek to IRS Center.

§6659 penalty for overvaluation was improper*Id.* Similarly in *McCrary*, the taxpayers conceded that the investment tax credit was improper because the agreement was a license, not a lease. 92 T.C. at 851. Because their concession precluded a finding that the investment tax credit was attributable to one of the tax motivated transactions described in 26 U.S.C. §6621(c), the penalty interest was not applicable. *Id.* at 858. In both of those cases, the taxpayers' violations were attributable to a reason other than one which supported the assessment of 26 U.S.C. §6621(c) interest. The courts felt it would be "too draconian" to assess the penalty interest in addition to the penalties the taxpayers already would face for their actions. *Id.*

Here, there has been no finding or concession that precludes the assessment of 26 U.S.C. §6621(c) interest. Plaintiffs would have this court extend *McCrary* and *Todd* to cover situations in which the taxpayers concede liability without stating specific grounds. In a case such as this, however, nothing prevents the IRS from finding that the adjustments were due to tax motivated transactions.

The bottom line is that the IRS did not need Plaintiffs' concession or agreement or a court determination to give it the authority to assess 26 U.S.C. §6621(c) interest after the settlement was entered. The court finds no law requiring the IRS specifically to identify the reasons for the assessment prior to a challenge by the taxpayer. The IRS still is entitled to the presumption of correctness of its assessment. The court recites the above litany of legal maxims to counter Plaintiffs' multiple statements, which are unsupported by any legal authority, suggesting the opposite. All of Plaintiffs' sophistry, indignation, and hysteria fall far short of proving that the IRS's assessment of 26 U .S.C. §6621(c) interest was improper as a matter of law. In fact, Plaintiffs present no evidence demonstrating that the partnerships were not tax motivated transactions. If Plaintiffs wish to present evidence on the matter, this

court has jurisdiction to consider whether the IRS's assessment of the 26 U.S.C. §6621(c) interest, a nonpartnership item, was correct. See 26 U.S.C. §7422(h); 28 U.S.C. §1346(a)(1).

The situation is rather simple, really. Plaintiffs and the IRS settled the partnership items without any factual concessions by Plaintiffs. As anticipated, Defendant then assessed tax and interest at the partner level. Plaintiffs contest the assessment. Plaintiffs have the burden to show that the assessment was improper. They have not done so, factually or legally. Therefore, Plaintiffs' partial summary judgment motion is DENIED.

IV. Conclusion

Based on the foregoing, the court GRANTS Defendant's Motion for Partial Dismissal of Plaintiffs' Complaint based on 26 U.S.C. §6404(e). The court DENIES Plaintiffs' and Defendant's cross-motions for partial summary judgment on the statute of limitations issue, but dismisses this claim on the basis that the court lacks subject matter jurisdiction. The court DENIES Plaintiffs' Motion for Partial Summary Judgment with Respect to the 26 U.S.C. §6621(c) Claims. The court GRANTS Plaintiffs' Motion for Leave to File Motion for Partial Summary Judgment Out of Time, Plaintiffs' Motion to Extend Time to Reply to Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, and Defendant's Motion for Leave to File Cross-Motion for Partial Summary Judgment with Respect to the Statute of Limitations Issue Out of Time.

§6226. Judicial Review Of Final Partnership Administrative Adjustments.

(c) PARTNERS TREATED AS PARTIES.—If an action is brought under subsection (a) or (b) with respect to a partnership for any partnership taxable year—

(1) each person who was a partner in such partnership at any time during such year shall be treated as a party to such action, and

(2) the court having jurisdiction of such action shall allow each such person to participate in the action.

[§6226(d) For the tax years in issue]

(d) PARTNER MUST HAVE INTEREST IN OUTCOME.—

(1) IN ORDER TO BE PARTY TO ACTION.—Subsection (c) shall not apply to a partner after the day on which—

(A) the partnership items of such partner for the partnership taxable year became nonpartnership items by reason of 1 or more of the events described in subsection (b) of §6231, or

(B) the period within which any tax attributable to such partnership items may be assessed against that partner expired.

[§6226(d) For tax years ending <u>after August 7, 1997</u>]

(d) PARTNER MUST HAVE INTEREST IN OUTCOME.—

(1) IN ORDER TO BE PARTY TO ACTION.—Subsection (c) shall not apply to a partner after the day on which—

(A) the partnership items of such partner for the partnership taxable year became nonpartnership items by reason of 1 or more of the events described in subsection (b) of §6231, or

(B) the period within which any tax attributable to such partnership items may be assessed against that partner expired.

Notwithstanding subparagraph (B), any person treated under subsection (c) as a party to an action shall be permitted to participate in such action (or file a readjustment petition under subsection (b) or paragraph (2) of this subsection) solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired with respect to such person, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion.

. . . .

(f) SCOPE OF JUDICIAL REVIEW.—A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such item among the partners.

§6229. Period of Limitations for Making Assessment.

(a) GENERAL RULE.—Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of–

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

(b) EXTENSION BY AGREEMENT.—

(1) GENERAL RULE.—The period described in subsection (a) (including an extension period under this subsection) may be extended--

(A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before the expiration of such period.

. . . .

(d) SUSPENSION WHEN SECRETARY MAKES ADMINISTRATIVE ADJUSTMENT.—If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended--

(1) for the period during which an action may be brought under section 6226(and, if a petition if filed under section 6226 with respect to such administrative adjustment, until the decision of the court becomes final), and

(2) for 1 year thereafter.

§6231. Definitions and Special Rules.

(a) DEFINITIONS.—For purposes of this subchapter—

(3) PARTNERSHIP ITEM.—The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, [subtitle F] such item is more appropriately determined at the partnership level than at the partner level.

(4) NONPARTNERSHIP ITEM .—The term "nonpartnership item" means an item which is (or is treated as) not a partnership item.

§6501. Limitations On Assessment And Collection.

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term `return' means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

. . . .

(c) EXCEPTIONS.—

(4) Extension By Agreement.—

(A) IN GENERAL.—Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

§7422. Civil Actions For Refund

(a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

. . . .

(h) SPECIAL RULE FOR ACTIONS WITH RESPECT TO PARTNERSHIP ITEMS.—No action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c).

§7441. Status.

There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.

§7442. Jurisdiction.

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

§301.6231(a)(3)-1 Partnership items.

(a) IN GENERAL.—For purposes of subtitle F of the Internal Revenue Code of 1954, the following items which are required to be taken into account for the taxable year of a partnership under subtitle A of the Code are more appropriately determined at the partnership level than at the partner level and, therefore, are partnership items:

(1) The partnership aggregate and each partner's share of each of the following:

(i) Items of income, gain loss, deduction, or credit of the partnership;

(ii) Expenditures by the partnership not deductible in computing its taxable income (for example, charitable contributions);

(iii) Items of the partnership which may be tax preference items under section 57(a) for any partner;

(iv) Income of the partnership exempt from tax;

(v) Partnership liabilities (including determinations with respect to the amount of the liabilities, whether the liabilities are nonrecourse, and changes from the preceding taxable year); and

(vi) Other amounts determinable at the partnership level with respect to partnership assets, investments, transactions and operations necessary to enable the partnership or the partners to determine

(A) The investment credit determined under section 46(a);

(B) Recapture under section 47 of the investment credit;

(C) Amounts at risk in any activity to which section 465 applies;

(D) The depletion allowance under section 613A with respect to oil and gas wells; and

(E) The application of section 751 (a) and (b);

(2) Guaranteed payments;

(3) Optional adjustments to the basis of partnership property pursuant to an election under section 754 (including necessary preliminary determinations, such as the determination of a transferee partner's basis in a partnership interest); and

(4) Items relating to the following transactions, to the extent that a determination of such items can be made from determinations that the partnership is required to make with respect to an amount, the character of an amount, or the percentage interest of a partner in the partnership, for purposes of the partnership books and records or for purposes of furnishing information to a partner:

(i) Contributions to the partnership;

(ii) Distributions from the partnership; and

(iii) Transactions to which section 707(a) applies (including the application of section 707(b)).

(b) FACTORS THAT AFFECT THE DETERMINATION OF PARTNERSHIP ITEMS .—The term "partnership item" includes the accounting practices and the legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc. Examples of these determinations are: The partnership's method of accounting, taxable year, and inventory method; whether an election was made by the partnership; whether partnership

property is a capital asset, §1231 property, or inventory; whether an item is currently deductible or must be capitalized; whether partnership activities have been engaged in with the intent to make a profit for purposes of §183; and whether the partnership qualifies for the research and development credit under §30.

House of Representatives Report No. 105-148 at 594 *reprinted in* 1997-4 Cumulative Bulletin at 916.

C. PARTNERSHIP SIMPLIFICATION PROVISIONS

. . . .

i. Provisions relating to Tax Court jurisdiction (§1239 of the bill and §§6225 and 6226 of the Code)

Present Law

. . . .

... For a partner other than the Tax Matters Partner to be eligible to file a petition for redetermination of partnership items in any court or to participate in an existing case, the period for assessing any tax attributable to the partnership items of that partner must not have expired. Since such a partner would only be treated as a party to the action if the statute of limitations with respect to them was still open, the law is unclear whether the partner would have standing to assert that the statute of limitations had expired with respect to him.

Reasons for Change

Clarifying the Tax Court's jurisdiction simplifies the resolution of tax cases.

Explanation of Provision

... The provision also permits a partner to participate in an action or file a petition for the sole purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired for that person. ...

Effective Date

The provision is effective for partnership taxable years ending after the date of enactment.